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SUPREME COURT, U.S.

No. 79-5932

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

JOHN DOE AND JANE ROE

v.

STATE OF DELAWARE

On Appeal From The Supreme Court of Delaware

JURISDICTIONAL STATEMENT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1979

No. _____

JOHN DOE AND JANE ROE

v.

STATE OF DELAWARE

On Appeal From the Supreme Court of Delaware

JURISDICTIONAL STATEMENT

Appellants John Doe and Jane Roe appeal from the judgment of the Supreme Court of Delaware entered August 24, 1979, affirming the permanent termination of their relationship with their five children.*/

OPINIONS BELOW

The opinion of the Supreme Court of Delaware, dated August 24, 1979, is attached to this jurisdictional statement as Appendix A.**/ Prior opinions in the same proceeding include the oral opinion of the Superior Court, delivered September 12, 1975, the order of the Delaware Supreme Court, dated September 28, 1976, and the letter opinion of the Superior Court, dated December 30, 1976,

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*/ Throughout this jurisdictional statement and in the appended documents, the real names of the parents have been changed to John Doe and Jane Roe and the names of their children have been altered in order to maintain confidentiality. A separate set of all papers reprinted in the Appendix with the original names of the parents and children left unchanged has been filed with the Clerk of this Court, with the request that confidentiality be maintained. Under Delaware law, the proceedings are confidential. 13 Del. Code §§ 1107(e), 1111.

**/ Excerpts from the Delaware Supreme Court opinion are reported in Matter of Five Minor Children, 407 A.2d 198 (Del. 1979), which is also included in Appendix A at pp. 16a-19a.

which are attached, respectively, as Appendices B, C, and D. None of the four opinions is officially reported.

JURISDICTION

The proceedings below were commenced in the Delaware Superior Court pursuant to 13 Del. Code §§ 1101-13 to terminate parental rights of the appellants in their five minor children. Following the decision of the Delaware Supreme Court on August 24, 1979 (Appendix A), a timely motion for re-argument was filed and was subsequently denied by an order of the Delaware Supreme Court entered on October 19, 1979, which is attached as Appendix E. The judgment of the Delaware Supreme Court was also entered on October 19, 1979, and is attached as Appendix F. A notice of appeal in this case was filed in the Delaware Supreme Court on January 7, 1980, and is attached as Appendix G.*/ Jurisdiction is conferred on this Court by 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and the provisions of 13 Del. Code §§ 1101-13 are set forth in Appendix H.

QUESTIONS PRESENTED**/

1. Is the Delaware statute, which provides for the permanent termination of the parent-child relationship where the parent is "not fitted," unconstitutionally vague and indefinite in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

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*/ A notice of appeal in identical form, also attached as Appendix G, was filed in the Delaware Superior Court on the same date, in the event that that Court should now be deemed the Court "possessed of the record." Sup. Ct. R. 10(3).

**/ The first question presented is properly presented by appeal and the second and third questions are therefore properly included in the jurisdictional statement. Prudential Ins. Co. v. Cheek, 259 U.S. 530, 547 (1922).

2. In light of the protected nature of the family relationship under decisions of this Court, does the Due Process Clause and this Court's decision in Addington v. Texas, 99 S. Ct. 1804 (1979), preclude the termination of the parent-child relationship based upon a mere "preponderance of the evidence"?

3. Under the Due Process Clause, must the state demonstrate a compelling state interest before terminating the parent-child relationship?

STATEMENT OF FACTS

Delaware, like many other states, provides a statutory procedure for termination of the parent-child relationship, commonly known as a "TPR" proceeding.*/ The TPR remedy is different from, and far more drastic than, a custody proceeding that transfers control of the child on a temporary or indefinite basis. The TPR remedy, by contrast, permanently terminates all legal rights of the parent or parents affected. In practical terms, it excludes the parent or parents from any further contact or relationship with the child, regardless of improvement or rehabilitation of the parent.

On July 2, 1975, the Division of Social Services of the Delaware Department of Health and Social Services (the "Division") filed a TPR petition in the Delaware Superior Court against John Doe and Jane Roe, the natural parents of five young children whose ages then ranged from 8 months to

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*/ "TPR" is an acronym for "termination of parental rights." 13 Del. Code §§ 1101-13. The entire chapter is reprinted in Appendix H to this petition.

4 years. The statutory "ground" asserted in the TPR petition was that set forth in 13 Del. Code § 1103(4), which reads in its entirety:

> "The parent or parents of any such child, or any person or persons or organization holding parental rights over such child are not fitted to continue to exercise parental rights."

Nothing in the statute provides any further guidance -- by definition, requirement, standards or otherwise -- as to what constitutes unfitness under this provision.*/

The TPR petition culminated bitter disputes between the Doe family and the Division which had begun several years before, when in 1972 Mr. Doe voluntarily and temporarily placed his then two children with the Division because he had lost his job and was not eligible for state assistance.**/ Although the two children were returned to him several months later, the Division subsequently instigated two separate actions against Mr. Doe before filing the TPR proceeding.

First, in January 1974, the Division caused to be brought an unsuccessful prosecution against Mr. Doe for sexually assaulting his oldest child. At trial, Mr. Doe flatly denied the charges,***/ and the alleged witnesses either failed to appear or testified that they had never

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*/ Section 1103(4) is the basic subsection governing involuntary termination; other subsections of Section 1103 deal with voluntary relinquishment, abandonment, mental incompetence and death of the parents. The statute is treated under state law as setting forth the grounds for termination, with the further statutory condition (13 Del. Code § 1108(a)) that termination also be "in the best interests of the child."

**/ Tr. 62, 67-68, 105, Dec. 7, 1976. References to "Tr." are to the TPR hearing transcripts.

***/ See Tr. 108-09, Dec. 7, 1976. As he testified later in the TPR case, "I put my tongue on the top of my daughter's lip and her nose playing." Tr. 75, Dec. 7, 1976. His daughter was then two years old.

made the principal allegations attributed to them by the Division. See Tr. 150, Dec. 7, 1976. While acquitting Mr. Doe of assault, the court convicted Mr. Doe of the misdemeanor of offensive touching -- with which he had not been charged -- and placed him on probation.

Second, shortly after the birth of their youngest, twin children, the Division in January 1975 initiated a criminal charge of incest against John Doe and Jane Roe on the ground that they were half brother and sister. Although the Division had known about this relationship since 1972 and assured the parents that it did not disqualify them for custody (Tr. 163, Dec. 7, 1976), the incest charge was actually filed in order to obtain control of the children.*/ After a trial in which the parents were unrepresented by counsel, they were convicted and placed on probation. Tr. 91, Dec. 7, 1976.

Following the incest conviction, the TPR proceeding previously described was commenced in July 1975. A.2a.**/

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*/ The notes taken by the Division representative who met with the state deputy attorney general read in pertinent part as follows:

> "[The DAG] said that the only way DSS could get a TPR was if DSS also had custody of the twins, because we can't prove the [parents'] unfitness if there are children in the home. Therefore, it was decided that [the DAG] would charge both [parents] with the criminal charge of incest on February 4, 1975. Then, DSS will petition for custody of the twins. The TPR for all of the three older children will follow pending the Court action over the criminal charges of incest." Parents' Trial Exhibit 21.

**/ At this stage, custody of all of the Doe children resided in the Division: the eldest had been taken incident to the first conviction (A.4a) and the youngest had been taken when both parents were jailed before trial incident to the incest charge. Id.; Tr. 112, Dec. 7, 1976.

After a truncated hearing, the Superior Court ruled summarily on September 12, 1975, "that the incestuous relationship between the father and the mother is sufficient in and of itself for termination of parental rights." A.5b. On review, the Delaware Supreme Court remanded the proceeding (A.1c) on the grounds that the record did not contain an adjudication that the termination of parental rights was also "in the best interests" of the children involved, as required under 13 Del. Code § 1108. See p. 4 n.*, above. There followed the full-scale TPR proceeding that gives rise to this appeal.

On December 6, 1976, proceedings in the remanded TPR case commenced before the same judge who had previously issued the summary opinion. At the outset of the proceedings, counsel for John Doe and Jane Roe challenged the TPR statute on the constitutional grounds asserted in this case.*/ The Division then presented its case beginning with the introduction in evidence of a "social report" prepared by the Division. Tr. 14-15, Dec. 6, 1976. This report comprised a lengthy recitation of the "facts" respecting the family compiled from Division records and other sources by a "writer who has no personal knowledge of the facts and circumstances." Social report, p.1.

The Division then presented witnesses, including a pair of psychiatrists who had never examined either the Doe parents or the children. Tr. 11, 39, Dec. 6, 1976;

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*/ See Tr. 6-10, Dec. 6, 1976, and Tr. 276, Dec. 20, 1976, reprinted as Appendix I. The claims were renewed in the Delaware Supreme Court in appellants' opening brief (pp. 8-36, 63-75), reply brief (pp. 1-17), and motion for reargument (pp. 1-12). See also decision, August 24, 1979, pp. 5-15 (A.5a-15a).

Tr. 176, Dec. 7, 1976. Instead, assuming the facts stated in the social report to be true, they concluded that the parents lacked "nurturing" capacity (Tr. 20, Dec. 6, 1976) and were not "capable of adequately raising children." Tr. 182, Dec. 7, 1976. Other Division evidence showed that John Doe had had an episode of drunkenness several years before,*/ and that Mr. Doe had moved his family repeatedly as he changed jobs. No independent evidence was introduced to show Jane Roe's unfitness.

For John Doe and Jane Roe, the evidence showed that the Division itself did not regard the half-sibling relationship as disqualifying appellants as parents;**/ that the eldest child had been moved through nine foster homes and was suffering from these changes (Tr. 241-45, Dec. 8, 1976); and that John Doe and Jane Roe had for the prior year maintained a stable relationship including employment of both parents. Tr. 113, Dec. 7, 1976; Tr. 389-92, Dec. 21, 1976. John Doe and Jane Roe's employer testified that they were reliable and trustworthy employees. Id. A psychologist, in charge of psychological services for the Division of Public Health, testified that their parental rights

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*/ John Doe explained that the episode had followed the surrender of his two eldest children to the Division at a time when he was out of work and was unable to receive welfare and had resulted from his anxiety at the loss of his children. Tr. 105-06, Dec. 7, 1976. His current employer testified at the TPR proceeding that Mr. Doe, employed in a facility where liquor was available, was invariably sober. Tr. 389-92, Dec. 21, 1976.

**/ Indeed, the Division's own social-worker representative had assured the parents that their relationship itself was not disqualifying (Tr. 163, Dec. 7, 1976), and its psychiatric witnesses either disclaimed reliance on the relationship (Tr. 32, Dec. 6, 1976) or essentially ignored it (Tr. 176-200, Dec. 7, 1976) in their testimony.

should not be terminated and that his own interview*/ had impressed him that there was a "good relationship" between the parents and a "strong desire to have their children back." Tr. 457, Dec. 21, 1976.**/

A week later, the Superior Court issued a three-page letter finding that the parents were "incapable of providing proper care" and determining that the best interests of the children would be served by terminating parental rights. A.3d. The court described the parents' "pattern of living" as reflecting moves from job to job and "frequent resort to the obtaining of public financial assistance in order for them and their children to exist." Id. These factors, together with "the moral atmosphere, the incestuous relationship between the parents, and the past conviction of [John Doe]" were cited by the court, without any further explanation of how or why they demonstrated the unfitness of the parents or the best interests of the children. Id. At the same time, the court found that during the past year the parents' "employment record and place of living has remained stable" (id.), but the court provided no explanation of why these circumstances were discounted or disregarded.

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*/ The witness had examined and tested both parents and had also examined two of the Doe children; and a psychologist on his staff had examined a third. Tr. 449, 461, Dec. 21, 1976.

**/ When custody of the children was taken from the parents, the court provided that they would be entitled to visit their children. However, the Division refused to allow such visits and successfully resisted an application by John Doe to obtain visitation rights. See Parents Trial Exhibits 15, 18.

On review, the Delaware Supreme Court affirmed. A.15a. It found that the statutory phrase "not fitted" meant "unfitted for parental duties" and was not unconstitutionally vague, indefinite and overbroad. A.7a. Rejecting a higher burden of proof than preponderance of the evidence, the court distinguished Addington v. Texas, 99 S. Ct. 1804 (1979) (requiring a higher standard for civil commitment) on the ground that termination of parental rights "is a civil proceeding, not a penal one . . . ." A.10a. Turning to the evidence,*/ the Delaware Supreme Court then decided in substance that (1) the asserted incest rendered the parents unfit and (2) the multiple jobs and moves and the prior convictions established that the best interests of the children would be served by termination. A.12a-15a. Finally, the opinion criticized the trial court's exclusion of evidence concerning the inadequacy of the foster home placement of the Doe children and lack of planning for their future, but it deemed the evidentiary rulings not to be reversible error. A.15a.

A timely motion for re-argument was filed on September 5, 1979, renewing the constitutional attacks based on the vagueness of the statute, the inadequate standard of proof and substantive due process. On October 19, 1979, the Delaware Supreme Court denied without opinion the motion for re-argument. A.1e.

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*/ The Delaware Supreme Court found that it was improper to admit the social report in evidence "in light of the fundamental parental rights at stake" (A.12a), but it concluded that the facts relied on by the Superior Court were established by independent evidence. Id. Since the Division's own experts testified on the premise that the entire social report was true, the Delaware Supreme Court assumed -- without any basis -- that the Superior Court was not influenced by the expert testimony and that the testimony was unnecessary to the results.

THE QUESTIONS ARE SUBSTANTIAL

I. THE DELAWARE TPR STATUTE IS UNCONSTITUTIONALLY VAGUE AND INDEFINITE.

Rejecting the parents' challenge, the Delaware Supreme Court sustained the "fitness" provision of 13 Del. Code § 1103(4) against charges of unconstitutional vagueness. Whether that statute satisfies due process requirements is a substantial constitutional question that deserves plenary review in light of the precious nature of the rights and relationships at stake, the direct conflict between the opinion below and rulings by several other courts, both federal and state, and the pervasiveness of the challenged language in TPR statutes of other states.

It is well established that parents' relationship with their children is one of the liberties to which due process must be accorded. Quilloin v. Walcott, 434 U.S. 246, 255 (1978). Indeed, this Court repeatedly has struck down state attempts to violate the integrity of the family,*/ for:

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder . . .. And it is in recognition of this that [our] decisions have respected the private realm of family life which the state cannot enter." Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

Accordingly, when regulating or curtailing the parent-child relationship, the state is obligated to promulgate a standard

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*/ Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Moore v. East Cleveland, 431 U.S. 494 (1977); Wisconsin v. Yoder, 406 U.S. 205 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

of "a greater degree of specificity than in other contexts," a standard proportionate to the preciousness of the interests at stake. Smith v. Goguen, 415 U.S. 566, 573 (1974).*/

It is difficult to imagine a statutory standard more vague than that of the Delaware TPR statute: parental rights shall be terminated if the parents "are not fitted to continue to exercise parental rights." 13 Del. Code § 1103(4). The statute -- whose language is almost circular -- offers no clue as to what constitutes unfitness, forcing courts, state officials and parents to guess at its meaning. Because meaningful and precise criteria have been incorporated into other states' TPR statutes (see pp. 14-15, below), the vagueness of Delaware's standard cannot be justified as inherently necessary.

The companion "standard" for terminations of parental rights under the Delaware Code, "in the best interests of the child" (see 13 Del. Code § 1108(a)), is equally vague. In fact, this Court recently characterized as "vague" an identical standard used in child custody proceedings. Smith v. Organization of Foster Families, 431 U.S. 816, 835 n.35 (1977). No criteria are offered by the Delaware statute for assessing a child's "best interests." Hence, both of the standards used in Delaware TPR proceedings present substantial constitutional questions warranting plenary consideration by this Court.

It is not surprising that TPR statutes employing essentially similar language have been held invalid by two

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*/ This Court has held that the standard of specificity is not relaxed for statutes "adopted for the salutory purpose of protecting children." Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 689 (1968).

federal courts. Thus, in Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976), the offending language authorized termination of parental rights of those whose homes were "unfit" and "improper." Recognizing the circular and opaque character of the statutory standard, the court held Alabama's TPR statute unconstitutionally vague. Similarly, the Iowa TPR statute, focusing on the terms "unfit" and "necessary parental care and protection," was invalidated in Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd on other grounds, 545 F.2d 1137 (8th Cir. 1976) (per curiam).*/ In addition to these federal court decisions, at least one state supreme court has invalidated language virtually identical to that upheld below. Davis v. Smith, 583 S.W.2d 37 (Ark. 1979) ("parents . . . unable to provide a proper home").

Although it has never expressly addressed the sufficiency of a TPR statute, this Court too has consistently invalidated statutory standards indistinguishable from that challenged here. For example, the terms "acceptable," "proper," and "not suited for young persons," were found unconstitutionally vague in Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968) (invalidating scheme for classifying motion pictures). See also Gelling v. Texas, 343 U.S. 960 (1952) ("such character as to be prejudicial to the best interests of the people").

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*/ In Alsager, the Court of Appeals admonished:

> "Both the vagueness and overbreadth attacks upon these provisions are serious ones. By declining to affirm on these grounds, however, we afford the Iowa courts an additional opportunity to give the statutory provisions a plainly desirable limiting construction." 545 F.2d at 1138.

The Delaware TPR statute entails each of the basic vices against which the vagueness doctrine is directed. The standard "not fitted" fails "to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Accord, Roe v. Conn, supra.*/ Even more important, the statutory vagueness authorizes enforcement of the drastic TPR remedy "on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, supra, 408 U.S. at 108. Accord, Alsager v. District Court, supra.**/

The TPR proceedings in this case illustrate these vices. Notwithstanding the drastic nature of the remedy imposed, the Superior Court offers no link whatsoever between its "findings" and the statutory standard. See p.8, above. Although several incidents of the Doe family history are described in its opinion, the court fails to indicate which of those incidents were determinative and how or why the determinative incidents demonstrated "unfitness." Indeed, the

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*/ The court stated:

> "Obviously [what is "unfit" and "improper"] is a question about which men and women of ordinary intelligence would greatly disagree. Their answers would vary in large measure in relation to their differing social, ethical, and religious views." 417 F. Supp. at 780.

**/ In Alsager, the court explained:

> "[A]rbitrary and discriminatory parental terminations are inevitable . . . . The termination of the parent-child relationship may turn upon which state officials are involved in the case, rather than upon explicit standards reflecting legislative intent. This danger is especially grave in the highly subjective context of determining an approved mode of child-rearing." 406 F. Supp. at 18.

Division and its experts rejected one of the incidents mentioned by the Superior Court and emphasized by the Delaware Supreme Court -- the parents' half-sibling relationship -- as a determinant of unfitness. See p. 7 n.**, above.

Despite the imprecision of the statutory language, the Delaware courts have refused to offer a narrowing or clarifying construction. In fact, rather than clarifying the statute, the court below extended the tautological definition offered by the legislature: "As to petitions for terminations of parental rights, the words 'not fitted' mean 'unfitted for parental duties.'" A.7a, quoting In re Dingee, 328 A.2d 139, 140 (Del. 1974). Coupled with the confidential nature of TPR proceedings themselves (13 Del. Code §§ 1107(e), 1111), the absence of authoritative judicial construction ensures that the vices entailed by the statute's vagueness will be realized.

That these vices are not inherent in the problem addressed by TPR statutes is demonstrated by the Michigan child custody statute, which offers explicit guidance as to the meaning of its statutory standard:

> "Best interests of the child" means the sum total of the following factors to be considered, evaluated and determined by the court:
>
> (a) The love, affection and other emotional ties existing between the competing parties and the child.
>
> (b) The capacity and disposition of competing parties to give the child love, affection and guidance and continuation of the education and raising of the child in its religion or creed, if any.
>
> (c) The capacity and disposition of competing parties to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other materials needs.

> (d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.
> (e) The permanence, as a family unit, of the existing or proposed custodial home.
> (f) The moral fitness of the competing parties.
> (g) The mental and physical health of the competing parties.
> (h) The home, school and community record of the child.
> (i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.
> (j) Any other factor considered by the court to be relevant to a particular child custody dispute. Mich. Comp. Laws Ann. § 722.23 (Supp. 1976). */

Whatever criteria a state may choose to select, there is clearly an opportunity to devise "explicit standards reflecting legislative intent" (Alsager v. District Court, supra, 406 F. Supp. at 18) which Delaware cannot constitutionally ignore.

Although TPR statutes can be made more specific, few of the fifty state TPR statutes offer guidance for their application; in fact, many have language virtually identical to that challenged here. **/ Accordingly, appellants' vagueness challenge to the Delaware statute has broad applicability. That factor, the statute's extraordinary vagueness, the precious quality of the family relationships terminated by the statutory remedy, and the underlying conflict on this precise issue between Delaware and the Federal courts all demonstrate that this appeal presents a substantial question warranting plenary review.

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*/ See also Ill. Rev. Stat. ch. 40 § 1501(1)(D) (defining "unfit person").

**/ E.g., Ore. Rev. Stat. § 419.523(2) ("unfit"); Mass. Gen. Laws Ann. ch. 210 § 3(b) ("best interests of the child").

II. IT IS UNCONSTITUTIONAL TO TERMINATE PARENTAL RIGHTS BASED ON A MERE PREPONDERANCE OF THE EVIDENCE.

In the courts below, appellants argued on constitutional grounds that termination of parental rights must be based on more than a mere preponderance of the evidence, and the Delaware Supreme Court explicitly rejected this contention. This case thus raises the question whether TPR proceedings -- like civil commitment, juvenile delinquency adjudication, denaturalization and deportation cases -- must employ a proof standard more stringent than a mere preponderance of the evidence. A number of lower federal and state courts have answered this question affirmatively, in direct conflict with the Delaware Supreme Court.

A substantial constitutional question is clearly presented. Less than a year ago, this Court unanimously held that "the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence." Addington v. Texas, 99 S. Ct. 1804, 1810 (1979). Previously, this Court had held that "clear, unequivocal and convincing" evidence is required in cases of denaturalization, expatriation and deportation.*/ The preponderance of the evidence standard has also been found unconstitutional

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*/ Woodby v. INS, 385 U.S. 276 (1966); Chaunt v. United States, 364 U.S. 350 (1960); Nishikawa v. Dulles, 356 U.S. 129 (1958); Gonzales v. Landon, 350 U.S. 920 (1955); and Schneiderman v. United States, 320 U.S. 118 (1943).

in juvenile delinquency adjudications (In re Winship, 397 U.S. 358 (1970)), and the Court has also required a higher standard of proof in libel cases where First Amendment rights were at stake.*/

In Addington, this Court emphasized that the state's action involved "a significant deprivation of liberty" invoking due process protection. 99 S.Ct. at 1809. No lesser liberty is involved in TPR proceedings. In Meyer v. Nebraska, 262 U.S. 390, 399 (1923), this Court stated that the liberty protected by the Fourteenth Amendment included the right "to marry, establish a home and bring up children, a privilege long recognized at common law as essential to the orderly pursuit of happiness by free men." See also pp. 10-11, above. For most couples, their children are their most important shared purpose and interest; and the permanent severance of that family relationship involves a "deprivation of liberty" at least as significant as a temporary isolation involved in Addington and Winship or the relocation required where an individual is denaturalized or deported.**/

In requiring a higher standard of proof, this Court has also emphasized as a matter of "paramount importance" the stigma resulting from the state's action. In re Winship supra, 397 U.S. at 374. In Addington the Court was concerned

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*/ In Rosenbloom v. Metromedia, 403 U.S. 29 (1971), the higher standard was required for findings of knowledge or wilful disregard which, if established, eliminated protection available under the First Amendment.

**/ If fact, one of the reasons given in Woodby requiring a higher standard of proof before aliens could be deported was that many aliens had established strong family, social and economic ties to this country. 385 U.S. at 286.

that the "adverse social consequences" of civil commitment could have "very significant impact on the individual." 99 S.Ct. at 1809. Yet the TPR determination in this case brands the parents "unfit" to raise their own children; and no stigma is more serious than the inevitable knowledge of neighbors and friends that the authorities have taken away one's children. However other societies may function, ours maintains a deeply rooted presumption that children should be raised by their parents. See Prince v. Massachusetts, supra (quoted p. 10, above). In this case, the state is not purporting merely to regulate the relationship between parent and child (e.g., by requiring public education or vaccinations) but to terminate it altogether and permanently. In such a situation "the risk of error" is not to be "share[d] equally" (Addington v. Texas, supra, 99 S.Ct. at 1808); a "bare" preponderance of the evidence is not sufficient to justify the termination of parental rights. Cf. Chaunt v. United States, supra, 364 U.S. at 353.

The facts of this case underscore the importance of the burden of proof. Although the trial court emphasized the parents' frequent moves and job changes and their resort to public assistance, it conceded that the parents' "employment record and place of living has remained stable" in the past year. A.3d. Similarly, the trial court seemingly relied on the parents' half-sibling relationship, but the state's own principal witnesses discounted or virtually ignored this charge as a basis for termination. See p. 7 n.**, above. No one can say that the result would have been the

same if the ultimate findings of "unfitness" and "best interests" had to be established with a higher degree of certainty.

At least five different courts have held that due process requires more than a preponderance of evidence for the termination of parental rights. These include two lower federal courts,*/ and three state courts.**/ However, there are a number of other states that permit the preponderance standard.***/ The need for resolution by this Court is finally supported by the fact that the burden of proof is relevant in every contested TPR proceeding, of which there are literally thousands every year.

III. DUE PROCESS FORBIDS TERMINATION FOR LACK OF A COMPELLING STATE INTEREST.

The final issue presented by this appeal is whether the conduct charged can, consistent with the Constitution, justify the termination of parental rights. In this case, there is no finding that either the asserted parental relationship or any of the other circumstances found has caused the children any injury whatever. Accordingly, a substantial constitutional question is presented under the Due Process Clause by the absence of any compelling state interest to justify the severance of protected parental rights.

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*/ Sims v. State Dept. of Public Welfare, 438 F. Supp. 1179 (S.D. Tex. 1977) (three-judge district court), rev'd on procedural grounds, 99 S.Ct. 2371 (1979); Alsager v. District Court, 406 F. Supp. 10, 25 (S.D. Iowa 1975), aff'd on other grounds, 545 F.2d 1137 (8th Cir. 1976).

**/ Matter of C.L.T., 597 P.2d 518, 526 (Alaska 1979); Matter of Welfare of Rosenbloom, 266 N.W.2d 888, 889-90 (Minn. 1978); In re Heidi T., 151 Cal. Rep. 263 (1978).

***/ E.g., In the Matter of K.M.S., 552 P.2d 578 (Ore. 1976); In the Matter of R.E.W., 545 S.W.2d 573 (Tex. 1976).

It is beyond dispute that the "liberty" protected by the Fourteenth Amendment to establish a family and rear children (see pp. 10-11, above) is afforded "both substantive and procedural protection." Smith v. Organization of Foster Families, 431 U.S. 816, 842 (1977) (footnotes omitted). Where so basic and precious a human right is concerned, permanent infringement of that right must be justified by a compelling state interest; and the infringement must be rationally and necessarily related to the interest evoked to outweigh it.*/ This Court has committed itself to make a "critical examination" of the state interest advanced to justify the invasion (Zablocki v. Redhail, 434 U.S. 374, 383 (1978)) and stressed that when the state undertakes an "intrusive regulation of the family, . . . the usual judicial deference to the legislature is inappropriate." Moore v. East Cleveland, 431 U.S. 494, 499 (1977).

The only plausible state interest in this case is the protection of the children from harm, but there was no showing that the children had suffered or would suffer harm from the conduct asserted. In finding the parents unfit, the Delaware Supreme Court rested directly upon the parents' asserted incest, but no showing was made that the existing children had or would suffer any harm whatever from remaining in the custody of parents linked by a half-sibling relationship. For children already born -- the only ones involved in this

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*/ Roe v. Wade, 410 U.S. 113, 152, 155-56 (1973); Dunn v. Blumstein, 405 U.S. 330, 335 (1972); Shapiro v. Thompson, 394 U.S. 618, 638 (1969); Bates v. Little Rock, 361 U.S. 516, 525 (1960).

case*/ -- the genetic dangers of inbreeding were either realized or not at the time the children were born.**/ As for future harm to the existing children, there was no testimony that the parents' relationship as such rendered them unable to provide ordinary care to their children. See p. 7 n.**, above.

The other principal circumstance relied on by the courts below was the frequency of the parents' relocations, job changes, and welfare applications. Yet, Americans are notoriously mobile, and the need for welfare assistance afflicts vast numbers of Americans at different times. Certainly such facts create no basis for presuming injury to the children, let alone injury so substantial as to justify permanently terminating the relationship.***/ In fact, the lower court specifically found that "during the past year while these proceedings for termination of parental rights have been pending, [the parents'] employment record and place of living has remained stable." A.3d.

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*/ At the instance of the Family Court, both John Doe and Jane Roe underwent medical procedures that prevent the bearing of any additional children. See Tr. 375-79, Dec. 20, 1976.

**/ In fact, the testimony concerning the mental abilities and potential of the children strongly indicated that no significant harm had occurred. Tr. 237-240, Dec. 8, 1976.

***/ See Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), and Stanley v. Illinois, 405 U.S. 645 (1972), disallowing conclusive presumptions imparing child-rearing and family relationships.

This case does not present any issue of fine appraisal or close weighing: there is simply no demonstration of any significant past or imminent harm to any of the children from continued parental care. Here, the state has taken the ultimate action to sever family ties by a permanent severance of the parents from five young children. If the decree stands, the parents will not even have a legal right to visit their children, and the children may be adopted by others or shuttled from foster home to foster home. Yet no harm to the children has been shown and, accordingly, no compelling state interest exists to justify the state's action.*/

The requirement of a compelling state interest, ignored by the Delaware Supreme Court, has been acknowledged by the lower federal courts. Thus, in Roe v. Conn, supra, 417 F. Supp. at 779, a three-judge District Court struck down a statute that permitted removal of child from "an unfit or improper home," saying:

> "States . . . may abrogate [parental] rights only to advance a compelling state interest and pursuant to a narrowly drawn statute restricted to achieve only the legitimate objective . . .. The State's interest, however, would become 'compelling' enough to sever entirely the parent child relationship only when the child is subjected to real physical or emotional harm and less drastic measures would be unavailing."

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*/ Certainly, deterrence of the parents' relationship is no justification. Cf. A.12a-13a. Deprivation of children as a form of punishment would manifestly be both "cruel and unusual." See generally Trop v. Dulles, 356 U.S. 86 (1958).

Other federal courts have followed the same approach.*/ In reaching its conclusion, the court in Roe v. Conn relied directly upon "the long line of Supreme Court cases" affirming the "fundamental right to family integrity protected by the Fourteenth Amendment . . .." 417 F. Supp. at 777.

This Court has not addressed the constitutional substantive standard for terminating parental rights,**/ but it has intervened vigorously over the course of many years to protect the family relationship. It has protected the right of parents to conceive children, to direct their education, and to house the family together, against constraints far less severe.***/ It is implicit in these decisions that a showing of some legitimate and compelling state interest is also required before a family relationship can be involuntarily destroyed. The question in this case -- whether a compelling state interest is required to justify termination of parental rights -- is "a federal question of substance" decided below "in a way probably not in accord with applicable decisions of this [C]ourt." Sup. Ct. R. 16.

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*/ E.g., Alsager v. District Court, 545 F.2d 1137 (8th Cir. 1976); Sims v. State Department of Public Welfare, 438 F. Supp. 1179 (S.D. Texas 1977) (three-judge district court), rev'd on procedural grounds, 99 S.Ct. 2371 (1979).

**/ Nevertheless, to the extent the Court has discussed the matter, its language points directly toward the requirement of a compelling state interest. See, e.g., Stanley v. Illinois, 405 U.S. 645, 651 (1972); Smith v. Organization of Foster Families, 431 U.S. 816, 863 (1977) (Stewart, J., concurring).

***/ Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Moore v. East Cleveland, 431 U.S. 494, 499 (1977).

CONCLUSION

For the reasons stated, the Court should note probable jurisdiction and set this case for plenary briefing and argument.

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IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-5932.

JOHN DOE and JANE ROE,

Appellants,

v.

THE STATE OF DELAWARE,

Appellee.

On Appeal From the Supreme Court of the State of Delaware.

MOTION TO DISMISS OR AFFIRM.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979.

No. 79-5932.

JOHN DOE and JANE ROE,

Appellants,

v.

THE STATE OF DELAWARE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF DELAWARE.

MOTION TO DISMISS OR AFFIRM.

The appellee respectfully moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Delaware on the ground that it is manifest that the questions on which the decision of the cause depends are so insubstantial as not to require further argument.

STATEMENT OF THE CASE.

John Doe and Jane Roe, appellants, are the natural parents of the five minor children who are the focus of this matter.[1] The appellee Division of Social Services of the Delaware Department of Health and Social Services (Division) has the duty to seek out minors in need of care and protection in Delaware. 31 *Del. C.* ch. 3.

On several occasions in the years prior to the institution of TPR proceedings in 1975, the Family Court of the State of Delaware awarded legal custody of Doe and Roe's children to the Division. Finally after a full five day hearing at which evidence was adduced concerning the family's chaotic and nomadic home environment, Doe's poor employment record, his criminal record and history of alcohol problems, as well as Roe's emotional detachment from the children, the Superior Court terminated Doe and Roe's parental rights having found them unfit parents and having concluded that such action was in the best interests of Amy, Bill, Charles, David and Ellen.[2] The Delaware Supreme Court affirmed.

---

1. Doe is the half-brother of Roe. Although not married, they lived together and held themselves out to the community as husband and wife (Roe was known as Mrs. Doe) at all time relevant to this action. Their children Amy, Bill, Charles, David and Ellen ranged in age from four years to nine months old when the TPR (termination of parental rights) action was filed in 1975. These children are now nine to five and a half years of age. They have not had any contact with their parents since 1975. Roe is now married to another man and lives with his child in Delaware. Doe presently lives in Georgia. He has not lived in Delaware for more than a year. All that Doe and Roe presently seek is "contact" with their children. See Affidavits of Doe and Roe in Support of Motion to Proceed in Forma Pauperis in this action.

2. The Superior Court previously had entered an order terminating parental rights solely on the basis of Doe and Roe's criminal incestuous relationship. The Delaware Supreme Court remanded with directions to consider whether termination was "in the best interests of the children."

The Division had a long history of providing supportive services to the Doe family. Early in 1972, Doe asked the Division to help find a place for Roe, Amy, and him to live.[3] After the birth of Bill, Doe and Roe asked the Division in September 1972 to provide a "decent home" for the children.[4] Doe had been fired from his job and the family had been evicted from its home and was living in a single room at a roominghouse.[5] On occasion, both before and after September 1972, Doe and Roe received public assistance (even at times when their children were in foster care).[6] When they were initially denied cash assistance in September 1972, their social worker made arrangements for Doe to have a fair hearing to challenge the denial.[7] After the Family Court approved the voluntary transfer of custody agreement, the children were placed in foster homes where they remained for about six months.[8] When Doe and Roe brought their marital difficulties to the attention of the Division they were referred to the marriage counseling service at Catholic Social Services.[9]

While Amy and Bill were in the Division's custody, Doe became intoxicated. He was violent and disruptive and, according to a complaint filed by Roe, threatened to kill her and accused her of running around with other men. As a result Doe was admitted to the Delaware State Hospital for treatment. After ten days, Doe signed himself out of the hospital. He was given medication and

3. Tr. 58.
4. Tr. 64.
5. Tr. 122-123.
6. Tr. 496-497.
7. Tr. 125-126.
8. Tr. 129.
9. Tr. 124.

referred to out-patient services at the mental hygiene clinic near his home but only kept one appointment.[10]

The Division continued its frequent contacts with Doe and Roe after Amy and Bill were placed in foster care,[11] visiting them several times a month and working with them so that the children could be returned to their home as soon as possible. After the Does made adequate housing arrangements, Amy and Bill were returned home in early 1973.[12] Doe had found new employment and the family was renting a "nice" home.[13] A week after Amy's return Doe quit his job, found another from which he was soon fired, and the family moved from the home in the middle of the night.[14] Doe then found work on a local dairy farm and the family moved into a tenant's cottage on the farm. While the house was "fairly decent" and adequate for the Does, their sister, her four children and her boyfriend moved in with them. The three bedroom house then accommodated two couples and six young children.[15] Within a month to six weeks Doe was fired for being unreliable. His employer could not depend on him to get in on time to milk the cows.[16]

The Does continued to drift from one abode to another, usually living in minimally adequate to poor housing. Between 1972 and 1974 alone, they lived in nineteen separate locations in eleven different towns.[17] During that

10. Tr. 62-63, 184.

11. Tr. 123-124. The social worker observed that the Does "didn't seem overly concerned about the placement of the children." Tr. 123.

12. Tr. 129.

13. Tr. 128.

14. Tr. 130; 142-143.

15. Tr. 130-131.

16. Tr. 66-70; 117-118.

17. Tr. 141-142.

period Doe worked only intermittently.[18] He held several jobs for between one day and two weeks.[19] Doe was discharged at times for drunkenness.[20] Other times he quit for no apparent reason and without another job prospect. He quit one job just after the birth of Charles, the third child.[21] Doe left other jobs at times when he lacked the money to pay the family's rent.[22]

Due to Doe's sporadic employment record the family was often in dire financial need.[23] The Division, in addition to providing public assistance on several occasions, periodically arranged for emergency cash assistance so that they could purchase food or assisted them in obtaining food from other sources.[24]

In 1973 three individuals familiar with the Doe's home life, including one of their sisters with whom they had shared living quarters, volunteered to Doe's social worker that he had been sexually toying with two year old Amy.[25] The Division petitioned the Family Court to remove Amy, Bill and Charles from the home. That petition was granted.[26] A criminal complaint alleging sexual assault was filed against Doe. He and Roe then fled to Maryland. During their four month absence from Delaware neither Doe nor Roe inquired about the welfare of their children.[27] After a trial, the Family Court convicted Doe of the lesser

18. Tr. 65; 79-82; 87.
19. Tr. 141-143; 189.
20. Tr. 142; 184
21. Tr. 185.
22. Tr. 182.
23. Tr. 71; 85.
24. Tr. 132.
25. Tr. 155.
26. Tr. 136.
27. Tr. 138.

included crime of offensive touching and of the crime of child neglect.[28] The Does continued to live in Maryland for about a year after Doe's conviction and they made one contact with Amy, Bill and Charles during that period.[29]

After a while the Doe's returned to Delaware with their infant twins David and Ellen. In February 1975 custody of those children was granted to the Division after Doe was convicted of the crime of incest.[30]

The Division social worker who worked closely with the Does between 1972 and 1974 concluded on the basis of her observation of Doe and Roe, that they simply lacked the capacity to provide their children with basic care. She noted that Roe never demonstrated a strong emotional attachment with her children.[31] That observation was confirmed by another social worker who described Roe's relationship with her children as "detached."[32] The only strong familial attachment which the Division was able to observe existed between Doe and Amy. That relationship was characterized as "unhealthy," though.[33]

Testimony of three expert witnesses at trial definitively established that Doe and Roe were incapable of

28. Tr. 77; Two witnesses testified at the Family Court trial that Doe repeatedly had "French kissed" Amy over her verbal objections and one of these witnesses also testified that he had directed this two year old on many occasions to expose her vaginal area and encouraged her to engage in acts of sexual self-gratification. Ex. 24 to TPR hearing. Tr. 515. An expert child psychologist who testified at the TPR hearing stressed the harmful effects on the child when a parent fails to channel and help his child sublimate infantile sexual urges. Tr. 17-18; 30-32.

29. Tr. 79.

30. Tr. 91; 111.

31. Tr. 140.

32. Tr. 168.

33. Tr. 140.

adequately caring for their children and that it was in the children's best interests that the termination petition be granted. Adaline R. Kinkaid, a psychologist, observed and tested the five children of Doe and Roe. She determined that Amy, the oldest child, was frightened and insecure and still bore the scars of her earlier experiences. However, Amy had been able to form a psychological bond with her foster parents and was secure in her present foster home.[34] Miss Kinkaid and the two psychiatrists who testified at the trial agreed that Amy's poor abilities in the area of social skills contrasted sharply with her average to superior intellectual abilities.[35]

Bill was found to have overcome his difficulties and was not as emotionally damaged as Amy, who spent more years in the home of Doe and Roe than her siblings.[36] Charles, who was mildly retarded, appeared to be settled in his present home but lacked the ability to adjust to further changes. David and Ellen, the twins who had lived most of their lives in foster homes, were characterized as normal children whose needs were being met in their present environment.[37]

Dr. T. Richard Huxtable, Jr., Chief of Forensic Psychiatry at the Delaware State Hospital, concluded that Doe and Roe were incapable of raising children.[38] He characterized Doe as a "sociopath" who lacked a sense of responsibility to a degree that was "overwhelming."[39] Both Dr. Huxtable and Dr. Charles Cook, a child psychiatrist, ascribed the lessening of appellants' chronic

34. Tr. 238.
35. Tr. 29; 186; 237.
36. Tr. 238.
37. Tr. 239.
38. Tr. 182.
39. Tr. 187.

pattern of instability to the fact that they were no longer subject to the stresses of parenthood.[40] Dr. Cook determined that Doe and Roe lacked the capability to function as nurturing parents as well as the ability to develop adequate parenting skills.[41] He described the environment which appellants had provided their children as "chaotic."[42]

As appellants indicate, Dr. Malvin Gelof, a psychologist, expressed his belief that Doe and Roe were sufficiently intelligent to raise children.[43] He could not, however, explain why appellants had not been able to provide a less than chaotic environment for their children in the past nor whether a termination order would be in the children's best interests.

After this evidence was considered by the Superior Court, it concluded that Doe and Roe were incapable of providing proper care for their children, citing the parents' employment records, the frequent changes in home surroundings, the moral atmosphere of the home where the criminal incestuous relationship continued in contravention of the order of the Family Court and the offensive touching conviction of Doe for toying with Amy. In their totality these facts provide ample evidence to support a finding that termination was in the best interests of the children. These same facts show Doe and Roe's unfitness to continue to exercise parental authority over the children. The Delaware Supreme Court did not err in affirming the judgment of the trial court in terminating Doe and Roe's parental rights.

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40. Tr. 35-36; 196.

41. Tr. 20. Dr. Cook testified that the geographic and emotional instability of the Does indicated an inability to provide the nurturance and stability required for even average human infant development. Tr. 15-17.

42. Tr. 30.

43. Tr. 457.

On behalf of Amy, Bill, Charles, David and Ellen, appellee earnestly requests the Court to give finality to that judgment and thereby permit the permanent placement of these children who have not known their biological parents for five years. Do not condemn them to the limbo of impermanent foster family relationships simply so these parents, now settled in other lives without them, can re-institute "contact" with them.

THE QUESTIONS ARE INSUBSTANTIAL.

A. The Delaware TPR Statute Is Not Unconstitutionally Vague and Indefinite.

It is axiomatic that a state must tread carefully when it seeks to alter the integrity of the family.[44] Nonetheless, it is also well established that neglectful parents may be separated from their children. *Stanley v. Illinois*, 405 U. S. 645, 652 (1972). Here, substantial evidence has established that the interests of the parents in retaining parental rights is inimical to the "best interests" of these children. Proof of both parental unfitness and the fact that termination lies in the best interests of Doe and Roe's children clearly satisfies the requirements of the Due Process Clause

44. Appellants cite the Court to a series of cases which restrict state intrusion into family life. However, none of them reflect the central familial issue in a TPR proceeding, the inherent conflict between the interests of the parents and the children. *Compare* Quilloin v. Walcott, 434 U. S. 246 (1978) (statute declares unwed fathers unfit as matter of law); Prince v. Massachusetts, 321 U. S. 158 (1944) (statute prohibits minor's sale of religious literature); Cleveland Board of Education v. LaFleur, 414 U. S. 632 (1974) (school regulations require early termination of pregnant teachers); Moore v. East Cleveland, 431 U. S. 494 (1977) (ordinance prohibits extended families in single family dwellings); Wisconsin v. Yoder, 406 U. S. 205 (1972) (mandatory school attendance laws conflict with religious principles); Pierce v. Society of Sisters, 268 U. S. 510 (1925) (school attendance laws preclude parochial school attendance); Meyer v. Nebraska, 262 U. S. 390 (1923) (state law prohibits teaching in German language).

of the Fourteenth Amendment to the United States Constitution. In *Quilloin v. Walcott,* 434 U. S. 246, 255 (1978), this Court cited an earlier concurrence by Mr. Justice Stewart which set forth the following dual proof requirement in cases such as this one:

> We have little doubt that the Due Process Clauses would be offended "(if) a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." *Smith v. Organization of Foster Families,* 431 U. S. 816, 862-863, 53 L. Ed. 2d 14, 97 S. Ct. 2094 (1977).

The dual fitness/best interests test had become a settled principle of Delaware TPR law long before *Smith.*[45]

The Delaware Supreme Court has been careful to explicate these terms so that they are comprehensible by parents and their application by the trial court cannot be

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45. Parental unfitness has been statutory ground for protecting children since 1907. In re Three Minor Children, 406 A. 2d 14, 16 (Del. 1979). Both unfitness and the best interests must be shown in a TPR. Cline v. Hartzler, 227 A. 2d 210 (Del. 1967). The best interest factor in TPR's is presently codified at 13 *Del. C.* § 1113. The best interest test has been applied consistently by Delaware courts when dealing with issues affecting the custody and control of children. *See e.g.* Smith v. Smith, 45 A. 2d 879 (Del. Super. 1946) (custody; good of child is "primary or leading consideration"); In re Fusco, 127 A. 2d 468 (Del. Orph. 1956) (TPR; "best welfare of the child is the paramount concern"); Nelson v. Murray, 211 A. 2d 842 (Del. 1965) (custody; "paramount concern is the present and future welfare of the children"); In re Two Minor Children, 231 A. 2d 475 (Del. 1967) (visitation; best interest of children is "primary consideration"); In re E., 239 A. 2d 626 (Del. 1968) (TPR; best interests of child is "prime and overriding concern."). In re One Minor Child, 295 A. 2d 727 (Del. 1972) (visitation; best interests of child supercedes "desires of parents.").

arbitrary. In doing so, the Delaware Supreme Court has ensured that the evils in the statute of which appellants complain: failure to give adequate warning of proscribed conduct and standardless and discriminatory application, cannot occur. Assuming *arguendo* that the statutory language is unconstitutionally vague on its face, that imprecision may be cured by narrowing court interpretations. *Lake Carriers' Assn. v. MacMullan*, 406 U. S. 498 (1972).

The Delaware Supreme Court has held that the common, ordinary dictionary meaning of the statutory phrase "not fitted" should be used in applying the TPR statute. ". . . [A]s to matters pertaining to custody of children, [the words 'not fitted'] are to be read generally as meaning 'unfitted for parental duties'." *In re Dingee*, 328 A. 2d 139, 140 (Del. 1974). Furthermore, the Delaware Supreme Court twice has cited with approval the following standards adopted in *Clarke v. Lyon*, 82 Neb. 625, 633, 118 N. W. 472, 475 (1908): a) concern the parent has shown in the past for the children; b) the suitability of the parents' domestic surroundings to receive the children; and c) the children's general welfare. *In re Dingee, supra; In the Matter of Three Minor Children*, 406 A. 2d 14, 17 (Del. 1979). Additionally, the Delaware Supreme Court held below that:

> Unfitness cannot be based on poverty and lifestyle which do not reflect a lack of concern for and ability to care for the children or an unwillingness to receive the children as part of a family. *In the Matter of Five Minor Children*, 407 A. 2d 198, 200 (Del. 1979).

The difficulty in drawing an absolute statute which could cover all examples of parental unfitness, a problem highlighted by the Delaware Supreme Court in *Dingee* and *Five Minor Children*, is patent when one looks to the

statutes to which appellants point as exemplars.[46] Neither of their terms is any more precise than the Delaware statute.

Nor is the "best interest" standard impermissibly imprecise. In fact, the Delaware Supreme Court has suggested that the relevant factors in a custody proceeding provide a good basis for assessing the "best interest" of a child in a TPR setting. *In the Matter of Three Minor Children, supra* at 19. These relevant factors include: the interaction and interrelation of the child with his parents, his siblings and others who may significantly affect his interests; the child's adjustment to his home, school, and community; and, the mental and physical health of the individuals involved. *See* 13 *Del. C.* § 772(a). The application of those factors here confirms the result of the trial court.

The conflict which appellants would create in the decisions of the courts which have considered TPR statutes under attack for vagueness does not commend itself to

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46. Appellants contend that the Michigan legislature has successfully managed to give explicit guidance to parents in its child custody statute. Mich. Comp. Laws Ann. § 722.23 (Supp. 1976). A close examination of the Michigan scheme, however, demonstrates its necessary lack of specificity. If Doe and Roe concede the appropriateness and acceptability of the Michigan law (a custody statute), they cannot attack the Delaware TPR statute. The Michigan law is replete with terms which necessarily require judicial explication. The terms "other emotional ties", satisfactory environment", "moral fitness", and "mental health" which are in that statute are clearly not explicit. The final factor to be considered by the Michigan domestic courts, i.e. "any other factor considered by the court to be relevant," is an emphatic endorsement of the holding of the Supreme Court of Delaware in this case. The Illinois "unfit person" statute referred to in a footnote at p. 15 of the Jurisdictional Statement is similarly composed of necessarily broad terms ("failure to maintain a reasonable degree of interest", "substantial neglect", "other neglect", etc.) Ill. Rev. Stat. ch. 40 § 1501 (1)(D).

this Court's attention. *Alsager v. District Court,* 406 F. Supp. 10 (S. D. Iowa 1975) *aff'd. on other grounds,* 545 F. 2d 1137 (8th Cir. 1976) is a judicial aberration.[47] Misapplying a strict vagueness test analogous to that employed in analyzing criminal statutes or those which chill protected First Amendment speech, the *Alsager* court overlooked or ignored the significance of the child's right to be free from an empty if not damaging "family" situation. For the state, or a legal guardian,[48] institutes a TPR proceeding not for its own benefit but for that of the child. To require a strict vagueness analysis is to condemn children who are neither abandoned nor seriously physically abused to suffer for an ideal called family integrity when the very dynamics of that concept do not lend themselves to precise definition.

Alsager stands appropriately alone in its analysis. The vast majority of state courts have refused to follow its teachings.

In *Matter of Keyes,* 574 P. 2d 1026 (Okla. 1978), the Supreme Court of Oklahoma upheld a statute which permitted termination if a parent

> [F]ailed to give the child parental care or protection necessary for his physical or mental health. 10 *O. S.* 1971, § 1130 A. (3)(a).

The Court was "not persuaded by the *Alsager* case . . . nor the reasoning of *Roe v. Conn* . . . ." *Id.* at 1029. Similarly, the Texas Court of Civil Appeals in *Sanchez v. Texas Department of Human Resources,* 581 S. W. 2d 260 (Tex.

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47. Only Roe v. Conn, 417 F. Supp. 769 (M. D. Ala. 1976) and Davis v. Smith, — Ark. —, 583 S. W. 2d 37 (1979) purport to follow *Alsager.*

48. 13 *Del. C.* § 1104.

1979) specifically refused to follow *Alsager* in reviewing a TPR appeal.

Other state courts have rejected vagueness attacks on statutes because their respective TPR laws provide basic standards which the "average intelligent person can understand" [49] or which can be "commonly grasped." [50] Some state courts which rejected vagueness challenges prior to *Alsager* were not swayed by the same rationale.[51]

The Court should dismiss this appeal because of the clear lack of a substantial constitutional question. The almost universal refusal to follow *Alsager* is recognition that

> . . . [U]nlike criminal statutes in which the interests of only one set of individuals is involved, the constitutional issue must be examined with the interests of both the child and the parents. What might be unconstitutional if only the parents' rights were involved is constitutional if the statute adopts legitimate and necessary means to protect the child's interests. *State v. McMaster,* 259 Ore. 291, —, 486 P. 2d 567, 569 (1971).

B. Extraordinary Standards of Proof Are Not Required in TPR Proceedings Because of the Competing Interests of the Children.

The children have the same or a greater stake in the outcome of TPR proceedings than their parents. Conse-

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49. Matter of D. T., 89 S. D. 590, 596, 237 N. W. 2d 166, 169 (1975); In re William L., 477 Pa. 322, 383 A. 2d 1228, cert. denied 439 U. S. 880 (1978).

50. In re Metteer, 203 Neb. 515, 279 N. W. 2d 374 (1979).

51. E.g., In re Cager, 251 Md. 473, 248 A. 2d 384 (1968); State v. McMaster, 259 Ore. 291, 486 P. 2d 567 (1971).

quently, application of the standard of proof sought by the appellants in the state courts—beyond a reasonable doubt—would constitute a denial of due process to the children. Indeed any standard other than a preponderance of the evidence would violate the children's rights.[52]

The requirements of the Due Process Clause in TPR proceedings, like any other application, are not rigid and inflexible. The appellee, of course, agrees that the freedom to maintain a natural family is a liberty interest protected by the Due Process Clause. *See, e.g., Cleveland Board of Education v. LaFleur,* 414 U. S. 632, 639-40 (1974); *Meyer v. Nebraska,* 262 U. S. 390 (1923). However, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U. S. 471, 481 (1972). The specific dictates of the Due Process Clause in any given situation involve consideration of certain distinct factors, including the private interests which will be affected. *Matthews v. Eldridge,* 424 U. S. 319, 335 (1976). The nature of the competing interests governs the standard of proof applied. One of the private interests involved here—that of the children—requires that any standard of proof other than a preponderance of the evidence be avoided.

The standard of proof is used to allocate the risk of error between the litigants. *Addington v. Texas,* — U. S. —, 99 S. Ct. 1804, 1808 (1979). In classes of cases where an erroneous verdict generally has no more serious consequences for either party, the preponderance of evidence is applied as the standard of proof. *In re Winship,* 397 U. S. 358, 371 (1970) (Harlan, J., concurring). Thus, unless one class of litigants will be more substantially

52. The standard of proof in most civil proceedings in Delaware is a preponderance of the evidence. Warwick v. Addicks, 157 A. 205 (Del. Super. 1931).

injured by an erroneous decision than the competing class of litigants, the preponderance of evidence is the appropriate standard to apply. The standard of proof in TPR proceedings, therefore, turns on the relative weight of the interests of the parties.

The interests of the children require that the preponderance of evidence standard be applied in TPR proceedings. Although the state is the nominal party in such proceedings, it represents the interests of the children. *See Stanley v. Illinois,* 405 U. S. 645 (1972).[53] The state has a transcendent interest in protecting the welfare of its minor children. *Ginsberg v. New York,* 390 U. S. 629, 641 (1968). It is these interests—which entail the right to a stable life free from physical and emotional abuse and neglect—which are at least equal to (if not paramount to) the interests of the parent.[54] J. Goldstein, A. Freud & A. Solnit, *Beyond the Best Interests of the Child,* 105-111 (1973).

There is no rational basis to conclude that the interests of the parents are so superior to those of the children so as to require an extraordinary standard of proof before their extinction.[55] Whatever due process safeguards attach

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53. At no time have the appellants contested the right of the state to terminate parental rights in appropriate cases. Although appellants may contest the conclusions drawn by the Delaware courts in this case, they do not contest the authority of the state to seek to protect the children's interests.

54. Certainly the interests of abused and neglected children are adverse to those of the parents who desire to maintain the already fractured familial relationship. *See* Smith v. Organization of Foster Families, 431 U. S. 816, 857 n. 1 (1977) (Stewart, J., concurring) (foster children may have interests adverse to foster parents in decision to relocate foster children).

55. In their Jurisdictional Statement appellants suggest no reason why the parental interests might be superior to those of the children.

to these parental interests, they become attenuated when those interests are opposed by the interests of the children. *See Smith v. Organization of Foster Families,* 431 U. S. 816 (1977). Necessarily this is always the case in contested TPR proceedings. A weighing of the relative importance of the parental interests vis-a-vis the interests of the children is properly a legislative function. Thus state statutory schemes requiring or permitting TPR applications to be decided on the basis of the preponderance of the evidence represent a legislative determination that the interests of the parents are not paramount to those of the children. *In re Hernandez,* 53 Ariz. App. 32, 530 P. 2d 389 (1975).[56]

Appellants virtually ignore the interests of the children in their Jurisdictional Statement. Rather they cite a number of cases[57] involving extraordinary standards of proof. These cases, however, have little or no relationship to the instant matter. Each of the cases cited by appellants involves the balancing of the interests of an individual litigant against those of society as a whole. But in TPR proceedings the interests to be balanced are not diffused among the general public; they are the interests of the children who have a direct and immediate stake in the outcome of the proceeding.

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56. The legislative branch is free to make such policy decisions. In Woodby v. Immigration and Naturalization Service, 385 U. S. 276 (1966)—relied upon by appellants (Jurisdictional Statement, p. 17)—the Court applied a clear and convincing standard of proof only after determining that "Congress has not addressed itself to the question of what degree of proof is required in deportation proceedings." 385 U. S. at 284.

57. Appellants cite: Woodby v. Immigration and Naturalization Service, 385 U. S. 276 (1966); Chaunt v. United States, 364 U. S. 350 (1960); Nichika v. Dulles, 356 U. S. 129 (1958); Gonzales v. Landon, 350 U. S. 920 (1955); and Schneiderman v. United States, 320 U. S. 118 (1942) (Jurisdictional Statement 16).

Even if the appellants' failure to consider the interests of the children is overlooked, their argument is still unpersuasive. Appellants place primary emphasis on *Addington v. Texas*, — U. S. —, 99 S. Ct. 1804 (1979) to support their claim that the state must prove the children's case beyond a reasonable doubt in TPR proceedings.[58] *Addington* refused to apply that standard for several reasons which are applicable here.

First, the *Addington* Court noted that in a civil commitment state power is not exercised in a punitive sense. Likewise, TPR proceedings are not conducted to punish the parent; rather they are expressly intended to protect the best interests of the child.

Second, the Court also found that the inquiry in a commitment proceeding is very different from that in a criminal proceeding. In criminal cases the standard is straight-forward: did the accused commit the crime alleged. But the Court noted that in civil commitment proceedings, the inquiry is not so clear. Given the lack of certainty and the fallibility of psychiatric diagnosis, the Court concluded that it was doubtful a state could ever

58. Throughout the course of the state court proceedings, appellants consistently argued that "beyond a reasonable doubt" was the appropriate standard; they never argued that a lesser extraordinary standard of proof, such as "clear and convincing", was appropriate. The substance of appellants' arguments are reflected in the Delaware Supreme Court's opinion, which considered only the beyond a reasonable doubt standard. Quite properly, the Delaware courts never considered the clear and convincing standard since appellants never argued in favor of its adoption.

Appellants do not expressly urge the adoption of the clear and convincing standard in their Jurisdictional Statement. However, to the extent that such argument is subsumed in the argument they have presented, it should be rejected since it has never been fairly presented to the state courts.

Appellee hastens to emphasize, however, that the interests of the children require rejection of *any* extraordinary standard of proof.

prove its case beyond a reasonable doubt. Similarly, given the necessity for subjective evaluations in TPR proceedings it would be impossible for a state to prove the children's case beyond a reasonable doubt. Thus, the sought-after standard would completely frustrate any statutory scheme permitting termination of parental rights.

C. The Termination Proceedings Do Not Constitute a Denial of Substantive Due Process.

Appellants now contend [59] that substantive due process requires that the state establish a compelling state interest before terminating their parental rights. This argument misapprehends the due process clause; the state need only establish that termination is reasonably related to a legitimate state purpose. Moreover, the evidence in this case clearly establishes a compelling state interest in the termination of the parents' rights.

Previous decisions of this Court indicate that the compelling state interest test is not applicable here. Rather the test is whether the termination is reasonably related to a legitimate state purpose. In *Pierce v. Society of Sisters,* 268 U. S. 510 (1925) the Court considered the validity of a state statute requiring children to attend public schools.[60] The statute was challenged, *inter alia,* on the

59. During the course of the proceedings in the state courts, appellants did not make any substantive due process argument. The substantive due process arguments now presented to this Court were not timely made to the Delaware Supreme Court. Appellants did not even mention substantive due process until after the Delaware Supreme Court had issued its opinion when they filed their motion for reargument. The Appellants' brief accompanying that motion includes 1½ pages of argument pertaining to substantive due process. Since it was presented for the first time on a motion for reargument it was not fairly raised in the state courts.

60. *Pierce* has been characterized as "perhaps the most significant (statement) of the Court in this area. . . ." Wisconsin v. Yoder, 406 U. S. 205, 232 (1972).

ground that it interfered with the family relationship. The Court responded by applying the reasonable relationship test. It wrote:

> Under the doctrine of Meyer v. Nebraska, 262 U. S. 390, 43 Sup. Ct. Rep. 625, 67 L. Ed. 1042, 29 A. L. R. 1146, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no *reasonable relation to some purpose within the competency of the state.*

(268 U. S. at 534-5) (emphasis added).

The significance of *Pierce* was underscored in *Wisconsin v. Yoder,* 406 U. S. 205 (1972) wherein the Court sustained a free exercise challenge by Amish parents who refused to send their children to public or private school. In arriving at its conclusion, the Court recognized that ordinarily only a reasonable relationship to some legitimate state purpose is required for a state to interfere with a familial relationship. However, the Court distinguished the case then before it solely on the basis that it also included a First Amendment claim.[61] No such claim is presented here. It is therefore clear from *Yoder* that the reasonable relation test is applicable here.

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61. The *Yoder* Court wrote in pertinent part:

> [W]hen the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a "reasonable relation to some purpose within the competency of the State" is required to sustain the validity of the State's requirement under the First Amendment. (406 U. S. at 233)

It is beyond question that the welfare of children is a legitimate concern of the state. *See, e.g., Ginsberg v. New York,* 390 U. S. 629 (1968). This Court has recognized that the severance of a familial relationship may be necessary to preserve the welfare of a child. *Stanley v. Illinois,* 405 U. S. 645 (1972) (dictum); *Smith v. Organization of Foster Families,* 431 U. S. 816 (1977) (dictum). Thus termination proceedings are reasonably related to a legitimate state purpose.

The question thus is whether the termination in the instant case bears a reasonable relationship to the welfare of the children. The record manifests such a relationship. Appellant's contention that no harm was done to these children is false. The record of the five-day proceedings in this case indicates that the parents had shown themselves to be incapable of providing these children with any sort of stable, nurturing environment. These parents made nineteen changes of residence between eleven different localities within a two-year period. Many of these residences were with other families in grossly over-crowded housing arrangements. The father was shown to have sexually toyed with his four-year-old daughter, resulting in a conviction for offensive touching. The two oldest children were in a voluntary foster placement for an extended period of time prior to the birth of the third child. The parents were engaged in an ongoing incestuous relationship throughout the case.

It can clearly be seen from these facts and the rest of the record that the mental, emotional and physical health of these children would have been placed in serious jeopardy had their parents' rights not been terminated. The State took repeated action to attempt to improve the children's living conditions prior to termination. Finally, termination proceedings were instituted to ensure these

children the greatest possibilities for maximum continuity of personal relationships, surroundings and environmental influences. Had it not terminated these rights, the children would most probably have been placed in prolonged foster care, while their parents attempted to resolve their problems which they had made no inroads against during the three years prior to the TPR. The detriment to children caused by the continued impermanence and uncertainty in their placement seems obvious. J. Goldstein, A. Freud & A. Solnit, *Beyond The Best Interests of the Child* (1973).

The showing in the state courts and the principles applied by those courts comport with the substantive requirements of due process. In *Smith v. Organization of Foster Families,* 431 U. S. 816 (1977), Mr. Justice Stewart espoused the following view in a concurring opinion:

> If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on 'the private realm of family life which the state cannot enter.'

(431 U. S. at 862-3) (Stewart, J., concurring). This view was later adopted by the full court in *Quilloin v. Walcott,* 434 U. S. 246, 255 (1978) (dictum). In the instant case the state courts have required and found a showing of unfitness of the parents. This showing establishes a reasonable relationship between the termination and a legitimate state purpose. Thus, the requirements of the Due Process Clause are satisfied.

CONCLUSION.

For the reasons stated herein, this appeal should be either dismissed or affirmed.

Respectfully submitted,

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No. 79-5932

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

JOHN DOE AND JANE ROE

v.

STATE OF DELAWARE

On Appeal From the Supreme Court of Delaware

APPELLANTS' OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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CONSTITUTION AND STATUTES

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STATE OF DELAWARE

On Appeal From the Supreme Court of Delaware

APPELLANTS' OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

This appeal presents three substantial federal issues each of which, standing alone, would justify plenary consideration: the unconstitutional vagueness of the Delaware TPR statute, the termination of the parent-child relationship based on a mere preponderance of the evidence, and the need for a compelling state interest to justify such termination. The State's motion to decide these issues summarily cannot be justified in light of the square conflict of the decision below with decisions of lower federal courts on each of the three issues, the broad applicability of the issues to hundreds or thousands of similar cases each year, and the inconsistency of the decision below with this Court's opinions in analogous cases.

I. THE DELAWARE TPR STATUTE IS UNCONSTITUTIONALLY VAGUE AND INDEFINITE.

In its motion to dismiss or affirm, the State implicitly concedes that the statutory terms "not fitted" and "best interests" are on their face too vague to meet due process requirements of precision and fair warning. In fact, this Court has itself criticized or condemned similar terms as unduly

vague.*/ Instead, the State asserts that "[a]ssuming arguendo that the statutory language is unconstitutionally vague on its face, that imprecision may be cured by narrowing court interpretations." State motion 11.

The defect in this argument is that the Delaware TPR statute has not been refined or limited by "narrowing court interpretations." Indeed, the Delaware Supreme Court below refused to effect a narrowing interpretation; it reasoned, as it had on previous occasions, that "unfitness does not require precise definition to be constitutionally sound." App. 7a, quoting In the Matter of Three Minor Children, 406 A.2d 14, 19 (Del. 1979) (addressing both "unfitness" and "best interests"). Similarly, in the other prior Delaware decision cited to support a "narrowing" construction -- In Re Dingee, 328 A.2d 139, 140 (Del. 1974) -- the Delaware Supreme Court flatly rejected the view that any narrowing construction was required and specifically asserted that "each case must be decided on its own peculiar facts." Id. Dingee is also the source of the circular definition, repeated in the lower court's decision in the present case, that "not fitted" means "unfitted for parental duties." App. 7a, quoting id.

In other words, contrary to the State's position that the Delaware Supreme Court has narrowed the statute, the Delaware Supreme Court itself has said that no such narrowing is necessary in its view, and that it will decide "each case . . . on its own peculiar facts." The constitutional

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*/ See, e.g., Smith v. Organization of Foster Families, 431 U.S. 816, 835, n.36 (1977) (characterizing as "vague" the phrase "the best interests of the child"); Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 689 (1968) (finding unconstitutionally vague the following terms: "not suited for young persons," "acceptable," "proper"); Gelling v. Texas, 343 U.S. 960 (1952) (finding unconstitutionally vague "such character as to be prejudicial to the best interests of the people").

vice of this procedure, of course, is that it leaves lawyers, litigants and lower court judges with no clarifying link between the factual evidence in any other case and the conclusory statutory finding.*/ This means that there is no "reasonable opportunity to know what is prohibited" and a substantial likelihood that the statute will be enforced "on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

The State concedes that the opinion below squarely conflicts on the vagueness issue with the recent federal court decision in Alsager v. District Court.**/ Alsager, a thoughtful and well reasoned opinion, has been followed in two other significant decisions, each of which also conflicts with the opinion below.***/ Thus, the State's assertion that Alsager is a "judicial aberration" that "stands appropriately alone in its analysis" is plainly wrong. State motion 13. Where three recent decisions are in direct conflict with the decision below on the constitutional issue, there is no basis for the State's suggestion that the question presented is so

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*/ This case is a compelling example: the Supreme Court's decision merely recites facts (App. 14a) and then asserts that "unfitness" and "best interests" are shown by "the undisputed evidence in the record" without further explanation. App. 15a.

**/ Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd on other grounds, 545 F.2d 1137 (8th Cir. 1976), discussed and quoted at J.S. 12.

***/ Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976), and Davis v. Smith, 583 S.W.2d 37 (Ark. 1979). In addition, Alsager has been cited with approval by several other federal courts. E.g. Davis v. Pace, 442 F. Supp. 258, 262 (S.D. Fla. 1977).

insubstantial that the case should be summarily affirmed or dismissed.

II. IT IS UNCONSTITUTIONAL TO TERMINATE PARENTAL RIGHTS BASED ON A MERE PREPONDERANCE OF THE EVIDENCE

At least five different courts, including two recent lower federal court decisions, have held that before a parental relationship may be involuntarily terminated, due process requires a higher standard of proof than the preponderance of the evidence standard employed by the Delaware courts.*/ The State's motion does not deny that there is a direct constitutional conflict between this series of lower court decisions and the decision of the Delaware Supreme Court in this case. In addition, this Court's analysis in Addington v. Texas, 441 U.S. 418 (1979), directly supports a requirement of a higher burden of proof standard where interests of great "weight and gravity" are at stake and "a significant deprivation of liberty" is involved. J.S. 16-17.**/

The State's basic argument is that a higher standard of proof is not required in TPR proceedings "because of the competing interests of the children." State motion 14. This argument utterly misconceives the "liberty" interest in the family relationship recognized by decisions of this Court. The Constitution protects "the family as a unit" as one of our

*/ Sims v. State Department of Public Welfare, 438 F. Supp. 1179 (S.D. Texas 1977) (three-judge district court), rev'd on procedural grounds, 99 S. Ct. 2371 (1979); Alsager v. District Court, supra; Matter of C.L.T., 597 P.2d 513 (Alaska 1979); Matter of Welfare of Rosenbloom, 266 N.W.2d 888 (Minn. 1978); In Re Heidi T., 151 Cal. Rep. 263 (1978).

**/ The State's motion explicitly concedes that "of course . . . the freedom to maintain a natural family is a liberty interest protected by the Due Process Clause." State motion 15.

fundamental values (Parham v. J.R., 61 L. Ed.2d 101, 113 (1979)), and this Court's decisions safeguard the "private realm of family life which the state cannot enter." Prince v. Massachusetts, 321 U.S. 158, 166 (1944). Thus, a higher standard of proof is required before that unit or realm can be sundered, not because the interests of parents are favored over the interests of children, but because the constitutional value creates a bedrock presumption that parents and children should remain together save where an overwhelming justification is shown for usurping that "custody, care and nurture of the child [which] reside first in the parents . . .." Quilloin v. Walcott, 434 U.S. 246, 255 (1978).

By contrast, the State's motion rests on the remarkable assumption that, while the parents may have a protected liberty interest in maintaining the unity of the family, the children have a presumptive "competing" interest in escaping their natural family and entrusting themselves to the care of state agencies, or to foster families where the state agencies may assign them. Any such conception is so alien to the constitutional value reflected in this Court's prior decisions that the State's defense underscores the need for plenary review.*/ In any event, the State's analysis is clearly not one that justifies summary disposition in the face of the general principles of Addington and the specific holdings of five other courts inconsistent with the decision below.

---

*/ The implicit suggestion that the children are quite likely to be better off in the care of the State is also remarkable in the context of the present record. In describing the "facts," the State's motion asserts blandly that a psychologist witness "determined that Amy, the oldest child, was frightened and insecure and still bore the scars of her earlier experiences." State motion 7. While the implication of the State's motion is that these earlier experiences were inflicted by her natural parents, the fact is that the psychologist made no such statement (see Tr. 238, Dec. 8, 1976); on the contrary, the psychologist's testimony on cross-examination indicates she was testifying about Amy's experiences in being shuttled through nine foster homes while in the custody of the State. Tr. 241-42, Dec. 8, 1976.

Here, as in Addington, "civil labels and good intentions" cannot mask the actual impact of a mistaken judgment on the family affected by the exercise of state power. 441 U.S. at 427, quoting In re Winship, 397 U.S. 358, 365-66 (1970). Far from distinguishing Addington, the State's motion actually concedes the similarities to this case. State motion 18-19. Since due process requirements reflect "the degree of confidence our society thinks [the fact finder] should have in the correctness of factual conclusions . . ." (id. at 423), it is impossible to justify here a standard of proof less demanding than this Court found to be requisite in Addington. If anything, this is a stronger case for a higher standard. J.S. 17-18.

This Court's recent decision in Vance v. Terrazas, 48 U.S.L. Wk. 4069 (Jan. 15, 1980), further supports plenary consideration of this case.*/ There, a divided Court sustained a Congressional statute requiring a preponderance of evidence in an expatriation proceeding, despite this Court's own "decided preference for requiring clear and convincing evidence to prove expatriation." Id. at 4073. The Court there rested directly upon Congress' specific exercise of its constitutional powers, including its "express power to enforce the Fourteenth Amendment." Id. at 4073. Of course, no such exercise of Congressional power supports the lower court's decision in this case.**/

---

*/ The Terrazas case was not discussed in the jurisdictional statement because that statement was prepared before Terrazas was decided. The motion to dismiss or affirm does not refer to it.

**/ The Court's reliance on the Congressional determination appears throughout its discussion. For example, the Court distinguished earlier cases as ones "none of [which] involved a congressional judgment," and it declined to "hold that Congress has exceeded its powers" in defining the standard of proof. Id. at 4073. Even with this Congressional determination, two members of this Court dissented on the burden of proof issue and two others dissented on other grounds without discussing the burden of proof.

III. DUE PROCESS FORBIDS TERMINATION FOR LACK OF A COMPELLING STATE INTEREST.

The jurisdictional statement asserted as the third issue for plenary consideration appellants' claim that the State must establish a compelling state interest before terminating the family relationship, and such an interest in this case could only be demonstrated by finding that termination was necessary to protect the children from harm. In other words, whatever other methods the State might employ to discourage incest or a "nomadic" family existence (App. 2d), it cannot deter such conduct by taking children away from their parents in the absence of a finding of harm to those children.

The State's motion clearly frames the issue by asserting that "the compelling state interest test is not applicable here." State motion 19. However, in Roe v. Conn, supra, a three-judge federal district court struck down a statute authorizing removal of a child from an "unfit or improper" home on the explicit ground that parental rights could be abrogated "only to advance a compelling state interest and pursuant to a narrowly drawn statute"; and the court further held that the interest would "become 'compelling' enough" to justify termination "only when the child is subjected to real physical or emotional harm and less drastic measures would be unavailing." 417 F. Supp. at 779. In light of this direct conflict, the first branch of the State's argument is no basis for summary disposition in the State's favor. */

*/ This Court's decisions, although not directly resolving the issue in the context of TPR proceedings, do support application of the compelling state interest test. See J.S. 23. By contrast, neither Pierce v. Society of Sisters, 268 U.S. 510 (1925), nor Wisconsin v. Yoder, 406 U.S. 205 (1972), cited by the State's motion (pp. 19-20), lend any support to the view that the family relationship may be severed without a compelling state interest. Pierce struck down a far milder requirement that children be required to attend public schools and Yoder sustained the parents' religious right to provide home education.

The State is on equally weak ground in arguing that the evidence supported a finding that termination of parental rights was necessary in this case to protect "the welfare of the children." State motion 21. There were no findings of any kind by the trial court or by the state Supreme Court to show that the children had ever suffered any harm or would suffer any harm from remaining with their natural parents.*/ Manifestly, the lower court decisions neither applied the correct constitutional standard nor made the findings necessary to comport with it. The decisions cannot be sustained summarily on the speculation that they might have made such findings if the lower courts had understood what the Constitution required.

Although the constitutional standard is the question presented for review, it should be emphasized that most of what the State's motion presents as "fact" has no relation to the lower courts' circumspect and limited findings.**/ However, so far as the findings and evidence may be relevant in determining

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*/ The decisions of both lower courts are conspicuous in their failure to address the impact of the conduct relied on upon the children. The focus of both opinions is on the convictions of the parents, their "frequent changes in home surroundings," and the parents' "employment record." See App. 14a. See also App. 3d. There is no assertion that the circumstances relied upon have harmed or will harm the children; there is only the concealing generality that it is in the children's "best interests" that they be removed.

**/ It is utterly untrue, for example, to assert that "the father was shown to have sexually toyed with his four-year old daughter" (State motion 21; see also id., p. 6, n.28), when the charge was flatly denied by the father and no such finding was made by the lower courts. Compare, e.g., App. 3d. The implied assertion that one of the children was scarred by her earlier experiences with her parents is also a patent misdescription; not only is there no finding to that effect, but the actual testimony was that it was the State's foster treatment of the child that inflicted harm. See p. 5, n.*, above. No finding of any kind was made that the children's home life was "chaotic" (compare State motion 8); on the contrary, the most specific finding was that "during the past year . . . [the parents'] employment record and place of living has remained stable." App. 3d.

whether this is a proper case for plenary review, it is difficult to imagine a TPR proceeding more redolent of injustice. The children have been taken permanently from a home admittedly stable at the time of the separation (see App. 3d) with no finding of actual harm to the children (see p. 8, above), based on testimony by two psychiatrists who had never examined the children or the parents (J.S. 6-7) and a double hearsay "social report" so untrustworthy that the lower court itself found it impossible to stomach. See App. 11a-12a; J.S. 6. If there were ever a case appropriate for deciding that a compelling state interest and a finding of actual harm are constitutionally required, it is precisely this case.

CONCLUSION

For the reasons stated in the jurisdictional statement and in this opposition, this appeal should not be decided summarily but should be set for plenary hearing.

Respectfully submitted,

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Areen, "Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases", 63 *Georgetown L.J.* 887 (1975) 30,41

"Developments in the Law—The Constitution and the Family", 93 *Harv. L. Rev.* 1156 (1980) 21,29,38

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Institute of Judicial Administration/American Bar Association, *Juvenile Justice Standards Project: Standards Relating to Abuse and Neglect* (tent. draft 1977) 23

J. Goldstein, A. Freud & A. Solnit, *Beyond the Best Interests of the Child* 31 (1973) 29

Mnookin, "Child Custody Adjudication: Judicial Functions in the Face of Indeterminancy", 39 *Law & Contemp. Prob.* 226 (1975) 20,21

M. Phillips, A. Shyne, E. Sherman & B. Haring, *Factors Associated With Placement Decisions in Child Welfare* (1971) 20

Statistical Abstract of the United States (1979) 40

Wald, "State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards", 27 *Stan. L. Rev.* 985 (1975) 21,29,37

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ON APPEAL FROM THE SUPREME COURT
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BRIEF FOR APPELLANTS JOHN DOE AND JANE ROE

OPINIONS BELOW

The opinion of the Supreme Court of Delaware, dated August 24, 1979, is attached to the jurisdictional statement as Appendix A; the opinion was not officially reported but excerpts are reported *sub nom. Matter of Five Minor*

Children, 407 A.2d 198.[1] Prior opinions in the same proceeding include the oral opinion of the Delaware Superior Court, delivered September 12, 1975, the order of the Delaware Supreme Court, dated September 28, 1976, and the letter opinion of the Superior Court, dated December 30, 1976. The prior opinions are attached to the jurisdictional statement, respectively as Appendices B, C, and D, but are not officially reported.

JURISDICTION

The decision of the Supreme Court of Delaware was entered on August 24, 1979, and a timely motion for reargument was filed but subsequently denied by an order entered on October 19, 1979, which is attached to the jurisdictional statement as Appendix E. The judgment of the Delaware Supreme Court was entered on the latter date and is attached to the jurisdictional statement as Appendix F. Notices of appeal were filed in the Delaware Supreme Court and the Delaware Superior Court on January 7, 1980, and are attached to the jurisdictional statement as Appendix G. On March 24, 1980, this Court noted probable jurisdiction. Jurisdiction is conferred on this Court by 28 U.S.C. §1257(1) (1976).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and the provisions

[1]Under Delaware law, the proceedings are confidential. 13 Del. Code §§1107(e), 1111 (1974).

of 13 Del. Code §§1101-13 (1974 and 1978 Supp.) are set forth in Appendix A to this brief.

QUESTIONS PRESENTED

1. Is the Delaware statute, which provides for the permanent termination of the parent-child relationship where the parent is "not fitted," unconstitutionally vague and indefinite in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

2. In light of the protected nature of the family relationship under decisions of this Court, does the Due Process Clause and this Court's decision in *Addington* v. *Texas*, 441 U.S. 418 (1979), preclude the termination of the parent-child relationship based upon a mere "preponderance of the evidence"?

3. Under the Due Process Clause, must the state demonstrate a compelling state interest, by making specific findings of existing or threatened harm to the child, before terminating the parent-child relationship?

STATEMENT OF FACTS

Appellants John Doe and Jane Roe ("the Does") are the natural parents of five young children: Amy, Bill, Charles, David and Ellen.[2] In December 1976, the Does' parental relationship with all of their children was permanently severed by an order of the Delaware Superior Court on the statutory ground that the Does were "not fitted" to be

[2]On March 31, 1980, this Court granted the Does' motion to substitute pseudonyms for their real names and those of their children to ensure confidentiality.

parents. 13 Del. Code §1103(4).[3] If upheld by this Court, that order would cause all parental rights and duties between the Does and their children "forever . . . to cease to exist as fully and to all intents and purposes as if [the children and their natural parents] were and always had been strangers." 13 Del. Code §1112.

A. Background

Delaware, like other states, provides a statutory procedure for permanent termination of the parent-child relationship, commonly known as a "TPR" proceeding. 13 Del. Code §§1101-13. Whereas a custody order transfers control of a child on a temporary or indefinite basis, a TPR order permanently severs all legal parental rights and duties of the parent or parents affected.[4] In practical terms, it forever excludes the parent or parents from any further contact with the child, regardless of the parents' improvement or rehabilitation.

The provision of the Delaware statute involved in this case provides for involuntary terminations of parental rights when:

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[3]Chapter 13 of the Delaware Code is reprinted in Appendix A of this brief.

[4]13 Del. Code §1112 (1974), specifying "the effect of termination," reads in pertinent part:

> "Upon the issuance of an order terminating the existing parental rights and transferring such parental rights to another person or organization, the effect of such order shall be that all of the rights, duties, privileges and obligations recognized by law between the person or persons whose parental rights are terminated and the child shall forever thereafter cease to exist as fully and to all intents and purposes as if the child and the person or persons whose parental rights have been terminated were and always had been strangers."

> "The parent or parents of any such child, or any person or persons or organization holding parental rights over such child are not fitted to continue to exercise parental rights." 13 Del. Code §1103(4) (1978 Supp.).

Nothing in the statute provides any further guidance—by definition, requirement, standards or otherwise—as to what constitutes unfitness under this provision.[5] A companion provision, applicable to all terminations, makes it a condition that termination also be "in the best interests of the child" (13 Del. Code §1108(a) (1974)); but no criteria are provided for making this judgment.

The TPR proceeding in this case culminated a bitter relationship between the Does and the Division of Social Services of the Delaware Department of Health and Social Services (the "Division"). That relationship had begun several years before, when in 1972 Mr. Doe voluntarily and temporarily placed with the Division Amy and Bill, then the Does' only children, because he had lost his job and was not eligible for state assistance.[6] Although the two children were returned several months later, and the Division seemed satisfied with the family situation,[7] antagonism developed between the Does and the Division.

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[5]13 Del. Code §1103(4) (1978 Supp.) is the basic subsection governing involuntary termination; subsections (1), (2), (3) and (5) of Section 1103 deal with voluntary relinquishment, abandonment, mental incompetence and death of the parents (*id.*).

[6]Tr. 62, 67-68, 105, Dec. 7, 1976. References to "Tr." are to the TPR hearing transcripts. By order of March 31, 1980, this Court directed that the case be heard on the original record.

[7]The principal social worker testified: "The [Does] had been in their home and had obtained furniture and food, and everything seemed to be going very well." The children were "healthy" and normal in appearance. Tr. 129, Dec. 7, 1976. See also *id.* at 130-31.

Before beginning the TPR proceeding, the Division instigated two criminal actions against Mr. Doe.

First, in January 1974, the Division caused to be brought an unsuccessful prosecution against Mr. Doe for sexually assaulting his oldest child. At trial, Mr. Doe flatly denied the charges.[8] The alleged witnesses to the incident, each of whom was hostile toward the parents for other reasons (see, *e.g.*, Tr. 482, Dec. 21, 1976), either failed to appear or testified that they had never made the principal allegations attributed to them by the Division. See Tr. 150, Dec. 7, 1976. While acquitting Mr. Doe of assault, the court convicted Mr. Doe of the misdemeanor of offensive touching—with which he had not been charged—and placed him on probation.

Second, shortly after the birth of their youngest, twin children, the Division in January 1975 initiated a criminal charge of incest against John Doe and Jane Roe on the ground that they were half-brother and half-sister. Although the Division had known about this relationship since 1972 and had assured the Does that it did not disqualify them for custody (Tr. 163, Dec. 7, 1976), the criminal charge was actually filed in order to obtain control of the children.[9]

---

[8]See Tr. 108-09, Dec. 7, 1976. As he testified later in the TPR case, "I put my tongue on the top of my daughter's lip and her nose playing." Tr. 75, Dec. 7, 1976. His daughter was then two years old.

[9]The notes taken by the Division representative who met with the state deputy attorney general read in pertinent part as follows:

"[The DAG] said that the only way DSS could get a TPR was if DSS also had custody of the twins, because we can't prove the [parents'] unfitness if there are children in the home. Therefore, it was decided that [the DAG] would charge both [parents] with the criminal charge of incest on 2/4/75. Then, DSS will petition for custody of the twins. The TPR for all of the three older children will follow pending the Court action over the criminal charges of incest." Parents' Trial Exhibit 21, offered at Tr. 400, Dec. 21, 1976.

After a trial in which the parents were unrepresented by counsel, they were convicted and placed on probation. Tr. 91, Dec. 7, 1976.

By this time, the Division had obtained custody of all five Doe children.[10] Nonetheless, the judge presiding at the incest trial led the Does (who were then unrepresented by counsel) to believe that their chances for regaining custody of their children would be enhanced if each would undergo medical procedures to prevent their bearing additional children. See Tr. 92-93, 112-113, Dec. 7, 1976; Tr. 340, 375-79, Dec. 20, 1976; Tr.491, Dec. 21, 1976. Eager to regain custody of their children, the Does agreed. Mr. Doe and Ms. Roe underwent such procedures on March 19, 1975 and March 26, 1975, respectively. Tr. 340, Dec. 20, 1976.

Less than a week later, on April 1, 1975, the Division informed the Does that it planned to seek termination of their parental rights. Tr. 491-92, Dec. 21, 1976. On July 2, 1975, the Division filed such a petition in Delaware Superior Court seeking to terminate parental rights of both parents with respect to all five children. The children at that time ranged in age from 8 months to 4 years. The ground specified in the petition, pursuant to 13 Del. Code §1103(4) (1978), was that the Does were not fitted to exercise parental rights. Tr. 4, Dec. 6, 1976.

---

[10]Custody of Amy, Bill and Charles had been taken at the time the assault charge was filed. Tr. 136, Dec. 7, 1976. David and Ellen had been taken when the Does were jailed and unable to post bond before trial on the incest charge. Tr. 112, Dec. 7, 1976.

B. The TPR Proceeding

After a truncated hearing, the Superior Court ruled summarily on September 12, 1975, "that the incestuous relationship between the father and the mother is sufficient in and of itself for termination of parental rights." J.S. App. 5b.[11] On review, the Delaware Supreme Court remanded the proceeding (J.S. App. 1c) on the ground that the record did not contain a determination that the termination of parental rights was also "in the best interests" of the Doe children, as required under 13 Del. Code §1108(a) (1974). There followed the full-scale TPR proceeding that gives rise to this appeal.

On December 6, 1976, proceedings in the remanded TPR case commenced before the same judge who had issued the summary opinion. At the outset of the proceedings, counsel for the Does challenged the TPR statute on the constitutional grounds asserted in this appeal.[12] The Division then presented its case beginning with the introduction in evidence of a "social report" prepared by the Division. Tr. 14-15, Dec. 6, 1976. This report comprised a lengthy recitation of the "facts" respecting the family compiled from the Division records by a "writer who has no personal knowledge of the facts and circumstances." Social report, p. 1, offered at Tr. 14,

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[11]The opinions below are reproduced in the separate appendix filed with the jurisdictional statement and cited in this brief as "J.S. App. _____."

[12]See Tr. 6-10, Dec. 6, 1976, and Tr. 276, Dec. 20, 1976, reprinted in J.S. App. 1i-8i. The claims were renewed in the Delaware Supreme Court in appellants' opening brief (pp. 8-36, 63-75), reply brief (pp. 1-17), and motion for reargument (p. 112). See also Delaware Supreme Court decision, August 24, 1979, pp. 5-15 (J.S. App. 5a-15a).

Dec. 6, 1976.[13]

The Division then presented witnesses, including two psychiatrists who had never examined either the Doe parents or the children. Tr. 11, 39, Dec. 6, 1976; Tr. 176, 188, Dec. 7, 1976. Instead, assuming the facts stated in the social report to be true, the witnesses concluded that the parents lacked "nurturing" capacity (Tr. 20, Dec. 6, 1976) and were not "capable of adequately raising children." Tr. 182, Dec. 7, 1976. Other Division evidence showed that John Doe had had one episode of drunkenness several years before,[14] and that Mr. Doe had moved his family repeatedly as he changed jobs.[15] No independent evidence was introduced to show Jane Roe's unfitness.

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[13]The information in the report was avowedly "compiled . . . to support the allegations that [the Does] are unfit parents of their five children." Social report, p. 4. However, the compiler testified that she did not make any investigation beyond the Division's records to determine the truth or accuracy of the information. Tr. 500, Dec. 21, 1976.

[14]John Doe explained that the episode had followed the surrender of his two eldest children to the Division at a time when he was out of work and was unable to receive welfare and had resulted from his anxiety at the loss of his children. Tr. 105-06, Dec. 7, 1976. His current employer testified at the TPR proceeding that Mr. Doe, employed in a facility where liquor was available, was invariably sober. Tr. 389-92, Dec. 21, 1976.

[15]While the State suggested at trial that Doe's employment record reflected a lack of reliability, there was also evidence that he had lost several jobs due to the State's intervention. For example, Doe lost one job because he had to take time off to defend the criminal suits brought by the Division. See, *e.g.*, Tr. 73, Dec. 7, 1976. He lost another job because his employer was annoyed by frequent calls from the Division inquiring about Doe's "personal problems." Tr. 80, Dec. 7, 1976. With regard to the family's relocations, some of which were to short-term temporary locations arranged by the Division or other agencies, the State's own officials acknowledged that the Does lacked a car, requiring that they live near Mr. Doe's place of employment. Tr. 212-13, Dec. 8, 1976; Tr. 325, Dec. 20, 1976.

For John Doe and Jane Roe, the evidence showed that the Division itself did not regard the half-sibling relationship as establishing parental unfitness;[16] that while in the State's care, the eldest child has been moved through nine foster homes and was suffering from these changes (Tr. 241-43, Dec. 8, 1976); that both parents had voluntarily obtained counseling that was of substantial benefit to them (Tr. 494, Dec. 21, 1976); and that John Doe and Jane Roe had for the prior year maintained a stable relationship including employment of both parents at relatively substantial wages. Tr. 82, 113, Dec. 7, 1976; Tr. 389-92, Dec. 21, 1976.

The Does' employer testified that they were reliable and trustworthy employees. Tr. 389-92, Dec. 21, 1976. A psychologist, in charge of psychological services for the Division of Public Health, testified that the Does' parental rights should not be terminated and that his own interview had impressed him that there was a "good relationship" between the parents and a "strong desire to have their children back." Tr. 453-54, 457, Dec. 21, 1976.[17] This witness, unlike the State's psychiatrists, had examined and tested both parents and had also examined two of the Doe children; and a psychologist on his staff had examined a third. Tr. 449, 461, Dec. 21, 1976.

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[16]The Division's own social-worker representative had assured the parents that their relationship itself was not disqualifying (Tr. 163, Dec. 7, 1976), and its psychiatric witnesses either disclaimed reliance on the relationship (Tr. 32, Dec. 6, 1976) or essentially ignored it (Tr. 176-200, Dec. 7, 1976) in their testimony.

[17]When custody of the children was taken from the parents, the court provided for visitation rights. However, the Division refused to allow such visits and successfully resisted an application by John Doe to enforce their right to visit their children. See Parents' Trial Exhibits 15, 18, offered respectively at Tr. 336, 343, Dec. 20, 1976.

A week later, the Superior Court issued a three-page letter determining that the best interests of the children would be served by terminating the Does' parental relationship with their children. J.S. App. 3d. The court described the parents' "pattern of living" as reflecting moves from job to job and "frequent[] resort to the obtaining of public financial assistance in order for them and their children to exist." *Id.* These factors, together with "the moral atmosphere, the incestuous relationship between the parents, and the past conviction of [John Doe]" were cited by the court, without any further explanation. *Id.* At the same time, the court found that during the past year the parents' "employment record and place of living has remained stable" (*id.*), but the court provided no explanation of why these circumstances were discounted or disregarded.

On review, the Delaware Supreme Court affirmed the permanent termination of the Does' parental rights. J.S. App. 15a. It found that the statutory phrase "not fitted" meant "unfitted for parental duties" and was not unconstitutionally vague, indefinite or overbroad. J.S. App. 7a. Rejecting a higher burden of proof than preponderance of the evidence, the court distinguished *Addington* v. *Texas,* 441 U.S. 418 (1979) (requiring a higher standard for civil commitment) on the ground that termination of parental rights "is a civil proceeding, not a penal one . . . ." J.S. App. 10a. Turning to the evidence,[18] the Delaware Supreme

[18]The Delaware Supreme Court found that it was improper to admit the social report in evidence "in light of the fundamental parental rights at stake" (J.S. App. 12a), but it concluded that the facts relied on by the Superior Court were established by independent evidence. *Id.* Since the Division's own experts testified on the assumption that the entire social report was accurate and relied directly upon it (see p. 42, n.68, below), the Delaware Supreme Court apparently assumed—without any basis—that the Superior Court was not influenced by the expert testimony.

Court then decided in substance that (1) the asserted incest rendered the parents unfit and (2) multiple jobs and moves and the prior convictions established that the best interests of the children would be served by termination. J.S. App. 12a-15a. Finally, the opinion criticized the trial court's exclusion of evidence concerning the inadequacy of the foster home placement of the Doe children and the Division's lack of planning for their future, but it deemed the evidentiary rulings not to be reversible error. J.S. App. 15a.

A timely motion for re-argument was filed on September 5, 1979, renewing the constitutional attacks based on the vagueness of the statute, the inadequate standard of proof and substantive due process. On October 19, 1979, the Delaware Supreme Court denied without opinion the motion for re-argument. J.S. App. 1e. This Court noted probable jurisdiction on March 24, 1980.

SUMMARY OF ARGUMENT

The Delaware statute at issue in this case provides for the permanent termination of parental rights of parents found "not fitted" to exercise such rights where the court also finds that the "best interests" of the child will be served by termination. 13 Del. Code §§1103(4), 1108(a) (1978 Supp., 1974). The statute neither defines nor provides any standards or criteria for applying these extraordinarily vague phrases. Yet, the remedy is the most drastic step possible in relation to a family: a TPR order means that all rights and duties between parent and child "shall forever thereafter cease to exist" as if "the child and [its natural parents] were and always had been strangers." 13 Del. Code §1112.

The relationship between parent and child is "constitutionally protected" (*Quilloin* v. *Walcott,* 434 U.S. 246,

255 (1978)), for "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents . . . ." *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944). Statutory terms comparable in vagueness to "not fitted" and "best interests" have been condemned repeatedly by this Court, which has insisted that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button,* 371 U.S. 415, 438 (1963). In judging family conduct, unnecessary vagueness is an invitation to *ad hoc,* personal and subjective judgments. Because Delaware can provide greater specificity and guidance in its standards, as other states have done, it is clearly obliged to do so.

Contrary to Delaware's position, the State is also obliged to establish the grounds for termination by clear and convincing evidence and not merely by the preponderance of evidence, as in ordinary suits for money damages. This Court has ruled that in certain civil proceedings "the individual's interest in the outcome . . . is of such weight and gravity that due process requires the state to justify [its action] by proof more substantial than a mere preponderance of the evidence." *Addington* v. *Texas,* 441 U.S. 418, 427 (1979). All of the criteria which required a "clear and convincing" standard in *Addington* are present in this case, including a significant state impact on highly valued constitutional interests, stigma resulting from the State's action, and the high risk of subjective and arbitrary judgment. In addition, the permanency of the termination remedy makes this an even stronger case than *Addington* for requiring the higher burden of proof.

Such a requirement of clear and convincing evidence serves practical as well as symbolic ends. It expresses the high "degree of confidence" our society demands before permanently depriving parents of their own children; it is a

counterweight to the danger that unfitness may be determined based upon the private values of the fact finder; and it serves as a partial check on the momentum of state intervention directed for the most part at the poor and helpless. See *Smith* v. *Organization of Foster Families*, 431 U.S. 816 (1977).

Finally, under the Constitution, "the dismemberment of [the] family" (*Stanley* v. *Illinois*, 405 U.S. 645, 658 (1972)) cannot be ordered without findings that the parental conduct in question has caused or threatens imminently to cause significant harm to the child. Only clear proof of a compelling state interest can justify the extreme remedy of depriving parents forever of the "companionship, care, [and] custody" of their own children. *Id.* at 651. The only interest that could be so compelling is the prevention of harm to the child.

As this case illustrates, requiring explicit and supported findings of harm is essential to assure that the compelling state interest actually exists in the case at hand. Such an "individualized" determination is required by due process (*Stanley* v. *Illinois, supra*, 405 U.S. at 655, 657) for harm cannot be merely conjectured or presumed. A judgment of parental unfitness, not grounded in actual or imminent harm specifically found, provides no reasonable basis for terminating parental rights. Instead, it makes such termination solely a form of punishment cruel and unusual to the parents and affirmatively harmful to the child.

ARGUMENT

I.

THE DELAWARE TPR STATUTE IS UNCONSTITUTIONALLY VAGUE AND INDEFINITE.

The Delaware TPR statute provides for termination of parental rights of parents who are found to be "not fitted to continue to exercise parental rights." 13 Del. Code §1103(4) (1978 Supp.). This statute—whose language is almost circular—offers no guidance as to what constitutes unfitness, forcing courts, state officials and parents to guess at its meaning. The companion "standard" for terminating parental rights, that termination be "in the best interests of the child" (13 Del. Code §1108(a) (1974)), is similarly imprecise; no criteria are offered for assessing a child's best interests. These "standards," affecting constitutionally protected interests of the most precious and fundamental kind, fail to satisfy long-established due process requirements of definiteness and specificity.

This Court's decisions "establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore* v. *City of East Cleveland,* 431 U.S. 494, 503 (1977) (plurality opinion). The Court repeatedly has struck down state attempts to violate the integrity of the family, for:

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder .... And it is in recognition of this that [our] decisions have respected the private realm of family life which the state cannot enter." *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944).

For example, this Court has recognized that traditional parental authority to "establish a home and bring up children" is sheltered by the Fourteenth Amendment's Due Process Clause.[19] Similarly, this Court's decisions have held that due process must be accorded to family members' rights to mutual association and companionship—most particularly to the rights of parents to the "companionship, care and custody" of their children.[20]

In this case the State seeks not merely to limit traditional parental authority or to regulate the conditions of "companionship, care and custody." Through the TPR proceeding, Delaware sunders the family itself by abrogating the reciprocal relationship between parent and child, a relationship that this Court has expressly held to be "constitutionally protected." *Quilloin* v. *Walcott,* 434 U.S. 246, 255 (1978). The irrevocable consequences of such state action are devastating. The parents lose forever rights of custody, visitation, instruction and upbringing of the children that they have conceived and nurtured. Delaware law expressly provides that upon issuance of a TPR order, all rights and duties between parent and child "shall forever thereafter cease to exist" as if "the child and [its natural parents] were and always had been strangers." 13 Del. Code §1112 (1974).[21]

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[19]*Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1923); *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534-35 (1925); *Ginsberg* v. *New York,* 390 U.S. 629, 639 (1968); *Wisconsin* v. *Yoder,* 406 U.S. 205, 232 (1972).

[20]*Stanley* v. *Illinois, supra,* 405 U.S. at 645, 651; *Moore* v. *City of East Cleveland, supra,* 431 U.S. at 501; *Smith* v. *Organization of Foster Families,* 431 U.S. 816, 844 (1977).

[21]Just as the parents lose parental rights, so the child is deprived permanently of the benefit of parental duties. Where parental rights are terminated, each "child loses the right of support and maintenance, for which he may thereafter be dependent upon society; the right to inherit; and all other rights inherent in the legal parent-child relationship, not just for the period during which he is subject to the code, but forever." *In re K.S. & M.S.,* 33 Colo. App. 72, 76, 515 P.2d 130, 133 (1973).

When the State seeks so drastic a remedy, it is obligated to provide a standard of "a greater degree of specificity than in other contexts," a standard proportionate to the preciousness of the interests and relationships at stake.[22] Indeed, this Court has insisted that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms."[23] This Court has also held that the standard of specificity and precision is not relaxed for statutes "adopted for the salutary purpose of protecting children." *Interstate Circuit, Inc.* v. *Dallas,* 390 U.S. 676, 689 (1968).

It is difficult to imagine statutory standards more imprecise that those of the Delaware TPR statute. A standard that poses the question whether parents "are not fitted to continue to exercise parental rights" (13 Del. Code §1103(4) (1978 Supp.)) is at least as vague as language that this Court has found unconstitutional in prior cases. For example, the terms "acceptable," "proper," and "not suited for young persons," were found unconstitutionally vague in *Interstate Circuit, Inc.* v. *Dallas, supra,* 390 U.S. at 676. Nor is the companion "best interests" language (13 Del. Code §1108(a) (1974)) more specific. *Gelling* v. *Texas,* 343 U.S. 960 (1952), invalidated the similar standard "such character as to be prejudicial to the best interests of the people."[24] This Court itself described as "vague" the "best

[22]*Smith* v. *Goguen,* 415 U.S. 566, 573 (1974). *Accord, Colautti* v. *Franklin,* 439 U.S. 379, 391 (1979); *May* v. *Anderson,* 345 U.S. 528, 533 (1953).

[23]*NAACP* v. *Button,* 371 U.S. 415, 438 (1963). *Accord, Buckley* v. *Valeo,* 424 U.S. 1, 41, 76 (1976).

[24]In a recent concurring opinion joined by four justices, Mr. Justice Stevens addressed the "best interests" standard in another context and observed: "That standard provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values" whose enforcement cannot be reconciled with the constitutional interests being protected. *Bellotti* v. *Baird,* 443 U.S. 622, 655 (1979).

interests of the child" standard as a test in child custody proceedings. *Smith* v. *Organization of Foster Families, supra,* 431 U.S. at 835, n.36.[25] When a definite standard is required even for so mild a disability as court costs, surely an indefinite standard cannot be a basis for terminating parental rights.[26]

Relying on the principles established by this Court, two federal courts—the only federal courts that have addressed vagueness challenges to TPR statutes—have invalidated TPR statutes employing language indistinguishable from that involved here. In *Roe* v. *Conn,* 417 F. Supp. 769 (M.D. Ala. 1976), the offending language authorized termination of parental rights of those whose homes were "unfit" and "improper." Recognizing the circular and opaque character of the statutory standard, the court held Alabama's TPR statute unconstitutionally vague:

> "Obviously [what is 'unfit' and 'improper'] is a question about which men and women of ordinary intelligence would greatly disagree. Their answers would vary in large measure in relation to their differing social, ethical and religious views. Because these terms are too subjective to denote a sufficient warning to those individuals who might be affected by their proscription, the statute is unconstitutionally vague." 417 F.Supp. at 780.

Similarly, the Iowa TPR statute, employing the terms "unfit" and "necessary parental care and protection," was

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[25]See also *Staub* v. *City of Baxley,* 355 U.S. 313, 322 (1958) ("effects upon the general welfare of the citizens"); *Musser* v. *Utah,* 333 U.S. 95, 97 (1948) ("injurious to public morals"). See generally Amsterdam, "The Void-For-Vagueness Doctrine in the Supreme Court," 109 *U. Pa. L. Rev.* 67, 90 (1960).

[26]See *Giaccio* v. *Pennsylvania,* 382 U.S. 399 (1966), holding invalid the imposition of court costs based on standards of "misconduct" and "reprehensible conduct."

invalidated in *Alsager* v. *District Court,* 406 F.Supp. 10 (S.D. Iowa 1975), *aff'd per curiam on other grounds,* 545 F.2d 1137 (8th Cir. 1976). The court declared:

> "[A]rbitrary and discriminatory parental terminations are inevitable . . . . The termination of the parent-child relationship in any given case may thus turn upon which state officials are involved in the case, rather than upon explicit standards reflecting legislative intent. This danger is especially grave in the highly subjective context of determining an approved mode of child-rearing." 406 F.Supp. at 18-19.[27]

In addition to these federal court decisions, at least two state supreme courts have invalidated TPR statutes containing language virtually identical to that upheld below. *Davis* v. *Smith,* 266 Ark. 112, 583 S.W.2d 37 (1979) (en banc) ("parents . . . unable to provide a proper home"); *Linn* v. *Linn,* 205 Neb. 218, 286 N.W.2d 765 (1980) ("best interests and welfare of the children"). The TPR statutes struck down in *Roe, Alsager, Davis* and *Linn,* like the Delaware TPR statute, lack "the first essential of due process," for each statute contains "terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.,* 269 U.S. 385, 391 (1926).[28]

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[27]Although in *Alsager* the Court of Appeals did not reach the vagueness issue it did admonish: "[B]oth the vagueness and overbreadth attacks upon these provisions are serious ones. By declining to affirm on these grounds, however, we afford the Iowa courts an additional opportunity to give the statutory provisions a plainly desirable limiting construction." 545 F.2d at 1138.

[28]Civil commitment statutes containing vague language similar to that of the Delaware TPR statutes have been held unconstitutionally vague by numerous federal courts. *E.g., Johnson* v. *Solomon,* 484 F. Supp. 278, 283 (D. Md. 1979) ("best suited to the physical, mental and moral welfare of the child consistent with the public interest"; "in need of assistance"); *Stamus* v. *Leonhardt,* 414 F. Supp. 439, 451 (S.D. Iowa 1976) ("best interest"); *Goldy* v. *Beal,* 429 F. Supp. 640 (M.D. Pa. 1976) (three-judge court) ("need of care").

The Delaware TPR statute entails each of the basic vices of vague statutes. The term "not fitted" fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned* v. *City of Rockford,* 408 U.S. 104, 108 (1972). Even more important, the statutory vagueness authorizes enforcement of the drastic TPR remedy "on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 109. Thus:

> "The use of an indeterminate standard means that state officials may decide on the basis of unarticulated (perhaps even unconscious) predictions and preferences that could be questioned if expressed. Because of the scope of discretion under such a standard, there is a substantial risk that decisions will be made on the basis of values not widely shared in our society." Mnookin, "Child Custody Adjudication: Judicial Functions in the Face of Indeterminancy," 39 *Law & Contemp. Prob.* 226, 263 (1975).

The same danger has been expressly recognized by this Court.[29]

Moreover, this problem is particularly dangerous in the highly subjective area of child-rearing.[30] Thus, "[m]any

[29]See *Musser* v. *Utah, supra,* 333 U.S. at 97, where this Court observed that the phrase "injurious to public morals" would encompass "almost any act which a judge or jury might find at the moment contrary to his or its notion of what was good for health, morals, trade, commerce, justice or order [and might depend on] the varying policies on such matters as use of cigarettes or liquor and the permissibility of gambling."

[30]See M. Phillips, A. Shyne, E. Sherman & B. Haring, *Factors Associated With Placement Decisions in Child Welfare,* 69-84 (1971). Phillips *et al.* conducted a simulation study designed to analyze the factors influencing a judge's decision to remove a child from its parents' home. Three judges, each with at least five years experience, were independently given the actual files for 94 children. They agreed on the appropriate disposition in only 45 of 94 cases. Yet, "even in cases in which they agreed on the decision, the judges did not identify the same factors as determinants, each seeming to operate to some extent within his own unique value system." *Id.* at 84.

decisions reflect the personal biases of judges and appear to result from a disapproval of the parents' lifestyles rather than an impartial judgment that the child would be harmed."[31] Moreover, available appellate review of TPR orders is "rendered inoperative" by the statutory vagueness, which "shield[s] from appellate scrutiny any judicial prejudice, discrimination or value imposition that may have affected the tribunal's decision."[32]

Finally, by failing to identify specific harms that justify termination or to specify criteria by which to evaluate TPR petitions, the vague statutory standard "increase[s] the likelihood that decisions to intervene will be made in situations where the child will be harmed by intervention."[33] Thus, in *Alsager* v. *District Court, supra,* the court observed that the unduly vague Iowa statute had allowed "improvident physical separations and final terminations." 406 F. Supp. at 23. Thus, the imprecise statutory language threatens the welfare of children, as well as the constitutional rights of their parents.[34]

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[31]"Developments in the Law—The Constitution and the Family," 93 *Harv. L. Rev.* 1156, 1318 n.60 (1980). Among examples given were removal or custody orders issued in substance to "punish parents' immaturity or choice of lifestyles which run afoul of the judges' notion of propriety." *E.g., In re New England Home For Little Wanders,* 367 Mass. 631, 328 N.E.2d 854, 887 (1975) (mother "took an unrealistic approach to her problems"); *Matter of Sherol A.S.,* 581 P.2d 884, 888 (Okla. 1978) (social worker found parents " 'very lazy and lacking in initiative' ").

[32]*Interstate Circuit, Inc.* v. *Dallas, supra,* 390 U.S. at 684-85; Developments, *supra,* 93 *Harv. L. Rev.* at 1234 n.222.

[33]Wald, "State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards," 27 *Stan. L. Rev.* 985, 1001 (1975). *Accord,* Mnookin, *supra,* 39 *Law & Contemp. Prob.* at 270.

[34]This case demonstrates the dangers of unwarranted removal caused by statutory vagueness. While there were no findings whatever that the children were harmed by their relationship with their parents (see pp. 34-44, below), uncontradicted evidence showed that Amy, the oldest child, bore substantial emotional scars due to her experiences in being shuttled through nine foster homes in five years of state custody. Tr. 241-42, Dec. 8, 1976.

The TPR proceedings in this case illustrate these failings. For example, the Superior Court's finding of "unfitness" was based substantially on the parents' half-sibling relationship. Yet every other State official familiar with the family circumstances—including another Delaware judge—had rejected the view that that relationship rendered the Does unfit parents.[35] Similarly, the Superior Court's finding of "best interests" was expressly premised on the parents' "pattern of living." J.S. App. 3d. Yet, the elements of that lifestyle—frequent changes in residence or employment and reliance on public assistance—are typical of a vast segment of the American population. See p. 40 and n.66, below. The lower courts suggested no reason why termination of parental rights would be in the best interests of the Doe children, but not in the best interests of other children raised by poor families or subject to frequent changes in residence.

Vague statutory standards and their attendant vices are *not* inherent in the problems addressed by TPR statutes. There are numerous alternatives to the Delaware TPR statute that could substantially increase the precision of the statute. Thus, Delaware could specify determinate standards that indicate to parents, courts and state officials when termination of parental rights is appropriate. See, *e.g.*, Tex. Code Ann. Tit. 2 §15.02(1) (1979) (reprinted in Appendix B). With or without definite standards, the

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[35]The Family Court judge who presided at the incest trial and who issued various custody orders affecting the Doe children advised the parents that their relationship would not bar their regaining custody. See Tr. 92, 113, Dec. 7, 1976; Tr. 379, Dec. 20, 1976; Parents' Trial Exhibit 10, offered at Tr. 334, Dec. 20, 1976. The Division's own social-worker representative had offered the parents similar assurances. Tr. 163, Dec. 7, 1976. The Division's psychiatric witnesses disclaimed reliance on the relationship (Tr. 32, Dec. 5, 1976) or essentially ignored it in their testimony. Tr. 176-200, Dec. 7, 1976.

legislature could identify criteria relevant to a TPR adjudication; such criteria would focus the virtually unlimited discretion of Superior Court judges under the present statute and provide a framework for appellate review. See, *e.g.*, Mich. Comp. Laws Ann. § 722.23 (1979 Supp.) (reprinted in Appendix B).

Alternatively, the State could implement structural changes in the TPR adjudicatory process, varying the standards and criteria for TPR determinations depending upon objective circumstances (*e.g.*, whether less severe alternatives, such as therapy, had been explored; how long the children had been outside the parents' custody). Such an approach has been suggested by the IJA/ABA Juvenile Justice Standards Project.[36] In fact, structural reform, determinative standards and relevant criteria were all included in the model TPR provisions recently drafted by an independent panel of experts and endorsed by the then Department of Health, Education and Welfare.[37]

Whatever scheme a state may choose, there is clearly an opportunity to develop statutory language that limits the potential for "arbitrary and discriminatory" application. *Grayned* v. *City of Rockford, supra,* 408 U.S. at 108. What is fatal here is Delaware's total failure, either by legislation or judicial gloss, to provide any guidance whatever to narrow, clarify or refine the bare statutory terms currently used by the State to render parents and their natural children

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[36]See Institute of Judicial Administration/American Bar Association, *Juvenile Justice Standards Project: Standards Relating to Abuse and Neglect* § § 2.1-2.2, 8.2-8.4 (tent. draft 1977).

[37]This model legislation was prepared pursuant to the Child Abuse, Prevention and Treatment and Adoption Reform Act, P.L. 95-266, Apr. 24, 1978, § 203. The proposed model act, as approved by the Secretary, has been published in the Federal Register, 45 Fed. Reg. 10622-99 (Feb. 15, 1980).

"strangers" by force of law. 13 Del. Code §1112 (1974).[38]

There is no slide-rule calculation for determining when statutory language is unconstitutionally vague, but Delaware's TPR statute is condemned by every criterion. Its standards are brief, general and almost circular; it affects rights of a most precious character; it invokes a drastic and permanent remedy; it virtually invites discriminatory, *ad hoc* and subjective determinations; and, above all else, it is vastly more vague and indefinite than it needs to be, in light of existing alternative ways to provide greater guidance. The Delaware TPR statute, unnarrowed by any judicial gloss, should be declared unconstitutional on its face.

II.

IT IS UNCONSTITUTIONAL TO TERMINATE PARENTAL RIGHTS BASED ON A MERE PREPONDERANCE OF THE EVIDENCE.

In ruling that the Does were not fit parents and that the best interests of their children required termination of parental rights, the Delaware Superior Court employed the "preponderance of the evidence" standard of proof ordinarily used in civil actions for money damages. The termination of parental rights, affecting severely the funda-

[38]Contrary to the State's assertion, the Delaware Supreme Court has not narrowed the statute by interpretation. Compare Delaware motion to dismiss or affirm, pp. 10-11. On the contrary, the Delaware Supreme Court has asserted only that "not fitted" means "unfitted for parental duties" and that "unfitness does not require precise definition to be constitutionally sound." J.S. App. 7a. In an earlier case, similarly refusing to offer a narrowing construction, the Delaware Supreme Court asserted that "each case must be decided on its own peculiar facts." *In re Dingee*, 328 A.2d 139, 140 (Del. 1974).

mental right of family integrity, requires clear and convincing evidence. This conclusion is consistent with the constitutional criteria set forth by this Court in standard of proof cases; it reflects the interests involved in TPR cases which are illustrated by the facts of this case; and it is supported by numerous lower court authorities requiring clear and convincing evidence in TPR cases.

It is well settled that "the right . . . to raise one's children" is essential, and that the "liberty" guaranteed by the Due Process Clause of the Fourteenth Amendment is impaired by the permanent separation of parents and children. *Stanley v. Illinois,* 405 U.S. 645, 651 (1972). Summarizing illustrative decisions, the Court there stated:

> "The rights to conceive and to raise one's children have been deemed 'essential,' *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923), 'basic civil rights of man,' *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942), and '[r]ights far more precious . . . than property rights,' *May v. Anderson,* 345 U.S. 528, 533 (1953). . . . The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska, supra,* at 399 . . . ."

What "due process" is required varies with the right affected and the nature of the State's action; but where family rights are at stake, this Court has insisted upon a high standard of procedural protection in a variety of contexts.[39]

Notwithstanding "civil labels and good intentions," "the individual's interest in the outcome . . . [may be] of such weight and gravity that due process requires the state to

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[39] *E.g., Armstrong v. Manzo,* 380 U.S. 545 (1965) (notice for termination of rights); *May v. Anderson,* 345 U.S. 528 (1953) (personal jurisdiction over parent required to transfer custody); *Stanley v. Illinois, supra,* 405 U.S. 645 (hearing on termination).

justify [its action] by proof more substantial than a mere preponderance of the evidence." *Addington v. Texas*, 441 U.S. 418, 427 (1979). In *Addington*, this Court held that civil commitment to a mental institution required the use of the "intermediate standard" of clear and convincing evidence (403 U.S. at 425), part way between a mere preponderance and proof beyond a reasonable doubt.[40] The Court stressed the "significant deprivation of liberty" involved in the state action (*id.* at 425); the "adverse social consequences" or "stigma" resulting from an adverse state determination (*id.* at 426); the possible risk that liberty will be impaired "based solely on a few isolated instances of unusual conduct" (*id.* at 427); and, above all, the "weight and gravity" of the individual's interest in the outcome of the proceeding. *Id.*[41]

Under the criteria of *Addington*, a similar requirement of clear and convincing evidence is warranted in TPR proceedings. As in *Addington*, the "weight and gravity" of the parents' interest in the TPR proceeding are very great and infinitely more important than the "mere loss of money." 441 U.S. at 424. For most couples, their children are their most important shared purpose and interest, and the permanent severance of this family relationship involves a deprivation of liberty at least as significant as the temporary

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[40]See also *In re Winship*, 397 U.S. 358 (1970) (civil juvenile delinquency proceeding); *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971) (civil libel action involving First Amendment protection).

[41]These same considerations have repeatedly been stressed by the Court in setting burden of proof requirements, whether resting on the Constitution or on the Court's supervisory power. See, *e.g.*, *Woodby v. INS*, 385 U.S. 276 (1966) (loss of liberty from deportation); *In re Winship*, *supra*, 397 U.S. at 367 (loss of liberty and stigma in juvenile delinquency proceeding); *Rosenbloom v. Metromedia*, *supra*, 403 U.S. at 50 (risk of error and preciousness of First Amendment rights).

isolation involved in *Addington* and *Winship.* Due process restrictions have been applied to prevent constraints on family autonomy far less intrusive than the permanent separation of parents and children.[42]

This case also resembles *Addington* in three other respects: obvious stigma is attached to a determination that parents are "unfit" to raise their children;[43] the same "possible risk" of an adverse determination based on "unusual conduct" or "idiosyncratic behavior" is present (441 U.S. at 427) because both cases involve an evaluation of "life styles"; and while there may be no threat of jail, a clear form of physical separation from one's family is imposed when a parent is told he or she may no longer live in the same household or have any other continuing relationship with his or her own child.[44] If the standards applied in

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[42]For example, the Court has protected the right of parents to direct the education of their children (*e.g., Meyer v. Nebraska, supra,* 262 U.S. 390); the right of an extended family to dwell together (*Moore v. City of East Cleveland, supra,* 431 U.S. 494); and the right of an expectant working mother to resist fixed maternity leave (*Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974)).

[43]This concern, stressed in *Winship* as a constitutional matter, is also present in civil cases where a higher burden of proof has traditionally been imposed by common law. Classic examples are the widely applied requirement of clear and convincing evidence where charges of fraud or undue influence are made. See 9 Wigmore, *Evidence* §2498 (3d ed. 1940).

[44]This consideration alone distinguishes *Vance v. Terrazas,* 48 U.S.L.W. 4069 (Jan. 15, 1980). That case, decided by a five-to-four vote, sustained expatriation based on a preponderance of the evidence, but it did so only in the face of an explicit Congressional directive and a stringent *substantive* standard of expatriation affording additional protection to the individual. Moreover, to the extent Congress has expressed a judgment on the standard of proof to be applied in TPR proceedings, it is decidedly in favor of a standard at least as demanding as clear and convincing evidence. See pp. 33-34, below.

Addington are followed, clear and convincing evidence is required in this case as well.

Indeed, TPR proceedings involve one element, not present in *Addington,* that strongly supports the use of a higher burden of proof. While civil commitment or a juvenile delinquency conviction involves at worst a temporary loss of liberty, a TPR determination is by its very nature permanent, once it has become final on appeal. It is unlike other steps the state may take in dealing with the family, steps that may be discontinued or reversed, such as social-worker visits or temporary custody orders. Under the Delaware TPR statute, a termination of parental rights and duties means that they "shall forever thereafter cease to exist" (13 Del. Code §1112 (1974)); and the state is immediately free to make new permanent arrangements for the child, including its adoption by new parents. No form of state action, other than the death penalty, is so certain to be irreversible. Thus, the more stringent burden of proof should be used "to 'instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for [the] particular type of adjudication' " here involved.[45]

The State's argument for a lower standard of proof appears to rest on the proposition that *Addington* juxtaposed the rights of the individual with those of the state, while a termination proceeding — in Delaware's view — involves a conflict of interests between the parents and their children. However, the higher burden of proof does not protect the parents' interests alone but also the rights of children to the care and protection of their parents. *See* p. 16, n.21, above. There is, in substance, a strong constitutional interest in

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[45] *Addington v. Texas, supra,* 441 U.S. at 423, quoting *In re Winship, supra,* 397 U.S. at 370 (Harlan, J., concurring).

favor of the integrity and autonomy of "the family as a unit." *Parham v. J.R.*, 442 U.S. 585, 602 (1979). The children have no presumptive competing interest in escaping their natural family and entrusting themselves to the care of state agencies or foster families where the state may assign them.

The constitutional presumption that parents and children have a common interest in remaining together is grounded in fact as well as the values of our civilization. It is a near certainty that *some* injury will be done to the children when the family is wrenched apart, for "the very fact of removal from even an inadequate natural family is often traumatic for the child."[46] No corresponding certainty exists that the child will be better off in an unknowable future of foster homes or state institutions.

> "[T]here is substantial evidence that, except in cases involving very seriously harmed children, we are unable to improve a child's situation through coercive state intervention. In fact, under current practice,coercive intervention frequently results in placing a child in a more detrimental situation than he would be in without intervention." Wald, *supra*, 27 *Stan. L. Rev.* at 993 (footnote omitted).

If anything, the interests of the children reinforce a need for a high standard of proof before their relationship with their parents is finally and irrevocably terminated.

Substantively, as well as formally, a termination pro-

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[46]*Smith v. Organization of Foster Families, supra*, 431 U.S. at 837 n.40. See J. Goldstein, A. Freud & A. Solnit, *Beyond the Best Interests of the Child* 31-35 (1973), describing the almost certain adverse consequences of changes in routine and separation from parents in infancy, in younger years, and even for school age children. "Psychologists unanimously agree that removal from the home, even a comparatively 'bad' home, will itself usually cause the child serious psychological injury." Developments, *supra*, 93 *Harv. L. Rev.* at 1320 (footnote omitted).

ceeding is a conflict between the parents and the state, not between the parents and their children. The state's interests are not identical to those of the children. It would blink reality to ignore the interests of the state welfare bureaucracy whose *raison d'etre* is intervention, the presence of a large foster-care establishment financially dependent on state intervention, and the fact that "terminations aid the state in meeting the demand for 'adoptable' children while also relieving it from financial costs of long-term foster care, home-maker services, and other welfare or public services."[47] Indeed, the state's momentum toward intervention, coupled with its greater resources, threaten to magnify "the risk of error" for the individual (*Addington v. Texas, supra,* 441 U.S. at 423) unless checked by a demanding burden of proof.[48]

While the higher burden of proof has a symbolic value, it serves practical interests as well, interests amply illustrated by this case. The Doe children, including virtual infants, were severed from their parents on evidence led by "expert" testimony by two psychiatrists who had never met either of the parents or their children. See p. 9, above. Evidence also included a "social report," comprising hearsay compiled by

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[47] *State ex rel. Juvenile Department of Multnomah County v. Wade,* 19 Or. App. 314, 527 P.2d 753 (1974), *appeal dismissed,* 423 U.S. 806 (1975), quoted and discussed in Areen, "Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases," 63 *Georgetown L.J.* 887, 893-94 (1975). See also *Smith v. Organization of Foster Families, supra,* 431 U.S. at 834-35, discussing the asserted "hostility of agencies to efforts of natural parents to obtain the return of their children" and the reasons alleged for this bias.

[48] How powerful that momentum may be is illustrated by this case. Although the State had known of the Does' half-sibling relationship for many years, it brought a *criminal* incest proceeding against them for the extraordinary specific purpose of assisting the State to obtain control of the children. See p. 6 and n.9, above.

a writer who admitted having "no personal knowledge of the facts and circumstances" (social report, p. 1), reflecting an extensive but onesided account of the Doe family's history.[49] The incest charge emphasized by the courts was discounted by the State's own witnesses and the Division of Social Services. See p. 10 and n.16, above. The State's evidence of the Does' numerous relocations and intermittent unemployment and welfare applications mirrors the experience of a vast number of Americans. See pp. 40-41, below.

By contrast, a psychologist who examined both of the parents and several of the children testified to the "good relationship" between the parents and their "strong desire to have their children back." Tr. 457, Dec. 21, 1976. Their employer testified that they were reliable employees. See p. 10, above. The trial court admitted that their employment record and place of living had remained stable during the prior year. See p. 11, above. No direct evidence was offered that the Does had caused harm to any of the children. See pp. 34-44, below. No one can say with any certainty that the Does would have lost their parental rights if termination had been conditioned on findings, based on clear and convincing evidence, that they were unfit and that their children's interest would best be served by granting termination.[50]

Finally, a requirement of clear and convincing evidence finds substantial support in the authorities, including both cases and statutes. Two decisions by federal district courts

[49]Having secured the introduction of the lengthy and prejudicial hearsay document, the State then proceeded to object repeatedly to the parents' evidence on a variety of grounds, including hearsay. *E.g.*, Tr. 291, 340, 375-77, Dec. 20, 1976, Tr. 394, 427, Dec. 21, 1976.

[50]Given the inherent vagueness of the substantive standards applied, it is literally impossible to prove that the fact finder would necessarily reach the same ultimate conclusion in the face of a higher burden of proof.

require clear and convincing evidence in TPR proceedings as a matter of constitutional right.[51] In addition, a number of state decisions have adopted the standard for TPR or custody proceedings within recent years,[52] and an additional number of states require the standard by statute.[53] At least two cases — the federal decision in *Alsager* and the state decision *In the Interest of G.M.* — rely directly on the analogy to civil commitment. The latter case, decided by the Texas Supreme Court after *Addington,* relied directly on *Addington* and concluded:

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[51]*Alsager v. District Court, supra,* 406 F. Supp. at 25; *Sims v. State Department of Public Welfare,* 438 F. Supp. 1179, 1194 (S.D. Tex. 1977), *rev'd on other grounds,* 442 U.S. 415 (1979).

[52]*E.g., Dale County Dept. of Pensions v. Robles,* 368 So.2d 39, 42 (Ala. Civ. App. 1979); *Caruso v. Superior Court,* 100 Ariz. 174, 412 P.2d 463, 467 (1966); *Matter of Adoption of J.S.R.,* 374 A.2d 860, 864 (D.C. App. 1977); *In Interest of C.K.G.,* 365 So.2d 424 (Fla. App. 1978); *In re Abdullah,* 80 Ill. App.3d 1144 (1980); *In Interest of Kerns,* 225 Kan. 746, 545 P.2d 187 (1979); *In Interest of Jackson,* 312 So.2d 912 (La. App. 1975); *Matter of Welfare of Rosenbloom,* 266 N.W.2d 888, 889-90 (Minn. 1978); *In Interest of Souza,* 204 Neb. 503, 283 N.W.2d 48 (1979); *Matter of Guardianship of R.,* 155 N.J. Super. 186, 382 A.2d 654, 657 (1977); *In the Interest of G.M.,* 596 S.W.2d 846 (Tex. 1980); *In Interest of Pitts,* 535 P.2d 1244, 1248 (Utah 1975); *In re Maria, Elisa, and Norma C.,* 5 Fam. Law Rptr. 2089 (Terr. Ct. U.S.V.I. 1978); *In re Sego,* 82 Wash.2d 736, 513 P.2d 831 (1973); *In re Willis,* 207 S.E.2d 129, 140 (W. Va. 1973); *In re X, Y, and Z,* 607 P.2d 911 (Wyo. 1980).

[53]*E.g.,* Alaska Stat. Ann. §47.10.080 (1979) Cal. Civ. Code §232(a)(7) (1980 Supp.); Ga. Ann. Stat. §24A-2201(c) (1976); Iowa Code Ann. §600A.8 (1979 Supp.); Mich. Comp. Laws Ann. §722.25 (1979 Supp.); Mo. Stat. Ann. §211.447 (1980 Supp.); N.H. Rev. Stat. Ann. §170-C:10 (1978); N.M. Stat. Ann. §40-7-4 (1979 Supp.); N. Dak. Cent. Code §27-20-44(2) (1974); 42 Pa. Cons. Stat. Ann. §6341(c) (Purdon); Tenn. Code Ann. §37-229(c) (1977); W. Va. Code §49-6-2(c) (1980 Supp.); Wis. Stat. Ann. §48.31(1) (1979).

> "The right to enjoy a natural family unit is no less important than the right to liberty which requires at least a clear and convincing standard of proof to inhibit such liberty through involuntary and indefinite confinement in a mental institution. Termination is a drastic remedy and is of such weight and gravity that due process requires the state to justify termination of the parent-child relationship by proof more substantial than a preponderance of the evidence. Hereafter, the 'clear and convincing evidence' standard of proof will be required in all proceedings for involuntary termination of the parent-child relationship." *In the Interest of G.M., supra,* 596 S.W.2d at 847.

Recently, an independent expert panel recommended to the then Department of Health, Education and Welfare a model state adoption act. See p. 23 and n.37, above. The model act specifically provides that involuntary termination of parent-child relationships shall be made "only . . . upon clear and convincing evidence" that the circumstances specified in the statute do exist. 45 Fed. Reg. at 10676. In the associated commentary, the drafters explained that the model act "requires this rigorous standard of proof as a protection of the fundamental rights at stake in a termination proceeding" in light of the fact that a "parent has a constitutionally protected liberty interest in the family relationship." *Id.* at 10678.

Finally, it is highly significant that Congress has explicitly regulated state TPR and custody proceedings involving Indian children and specially addressed the burden of proof standard. Foster care placement may be ordered in such proceedings only on a specified determination "supported by clear and convincing evidence"; and "termination of parental rights" may be ordered only upon "evidence beyond a reasonable doubt."[54] The House Report observed

[54]See Indian Child Welfare Act of 1978, 25 U.S.C. § §1912 (e), (f) (1978 Supp.), which are reprinted as Appendix C to the brief and discussed at pp. 38-39, below.

that "the committee feels that the removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty...." H. Rep. No. 95-1386, 95th Cong., 2d Sess. 22 (1978).[55]

III.

DUE PROCESS FORBIDS TERMINATION OF PARENTAL RIGHTS ABSENT A COMPELLING STATE INTEREST EVIDENCED BY FINDINGS OF HARM TO THE CHILD.

The final error committed by the lower courts is the severance of the Does' parental relations with their children without any supported determination that such a severance was necessary to protect the children against existing or imminent harm. The Constitution requires such a demonstration, for without it the state interest necessary to justify this drastic remedy does not exist. The substantive issue squarely presented by this case should be decided even if the Court determined to reverse on one or both grounds set forth in Parts I and II of this brief.[56]

It is settled that the "liberty" protected by the Fourteenth Amendment to marry and raise children (see pp. 15-16, 24-

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[55]"Where the State initiates a civil proceeding to deprive [the parent] of the custody of her children," the case "by its very nature resembles a criminal prosecution." *Meltzer v. C. Buck LeCraw & Co.*, 402 U.S. 954, 959 (1971) (Black, J., dissenting from denials of review).

[56]If the Delaware statute is held unconstitutionally vague, as we submit it should be, then Delaware and other legislatures are likely to enact new legislation. It is thus a timely and appropriate occasion for this Court to rule on the recurring substantive issue raised by Part III of this brief.

25, above) is afforded "both substantive and procedural protection." *Smith v. Organization of Foster Families, supra,* 431 U.S. at 842 (footnote omitted). The constitutional interest of a parent in the "companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' " *Stanley v. Illinois, supra,* 405 U.S. at 651. When the state undertakes an "intrusive regulation of the family" then "the usual judicial deference to the legislature is inappropriate" (*Moore v. City of East Cleveland, supra,* 431 U.S. at 499); and such regulation can only be justified by a compelling or substantial state interest proportionate to the constitutional right being invaded.

This Court has repeatedly required such a compelling or substantial state interest, where fundamental rights are involved, in a variety of contexts.[57] The same requirement is reflected in practically all of this Court's decisions protecting family rights, from *Meyer v. Nebraska* through *Moore v. City of East Cleveland*; few, if any, of the cases could have been decided the same way if the state were required merely to demonstrate the same type of rational relation to a permissible state goal that is sufficient for ordinary economic legislation.[58] The question posed, therefore, is *what*

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[57]*E.g., Roe v. Wade,* 410 U.S. 113, 155 (1973) (decision whether to bear children); *Dunn v. Blumstein,* 405 U.S. 330, 335 (1972) (right to vote); *Shapiro v. Thompson,* 394 U.S. 618, 638 (1969) (interstate travel).

[58]In *Meyer,* for example, the Court recognized that the invalid statute's general purpose of fostering proficiency in the English language was permissible (262 U.S. at 398-99), and in *Moore v. City of East Cleveland,* the Court acknowledged that "preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue burden on East Cleveland's school system" were "legitimate goals" served

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governmental interest is sufficiently compelling or important to justify the extreme remedy of a permanent separation of parents from their natural children.

The answer must be that to justify a remedy so severely affecting the fundamental right to raise one's own child, the state must show parental behavior evidencing significant harm to the child, either actual or imminent. Indeed, this Court has already explicitly rejected the notion that the state could constitutionally "force the breakup of a natural family . . . without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."[59] However, if the requirement of unfitness is to be more than an abstraction readily ignored, then the unfitness must be related to protecting the child against harm caused by parental conduct.

The need for a showing of existing or imminent harm is reinforced by practical considerations. Without this leash, the concept of unfitness has a promiscuous capacity to reflect merely the personal taste or standards of a single social worker or judge. Findings of unfitness, detached from

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(footnote continued from preceding page)
marginally by the condemned ordinance. 431 U.S. at 499-500.

The problem in such cases is not that the goal is frivolous or the means completely arbitrary but rather that, where fundamental constitutional rights are concerned, mere rationality is not enough. Instead, "this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Id.* at 499. See also, *e.g., Stanley v. Illinois, supra,* 405 U.S. at 652 ("legitimate interests, well within the power of the State"); *Cleveland Board of Education v. LaFleur, supra,* 414 U.S. at 641 ("continuity of instruction is a significant and legitimate educational goal").

[59]See *Quilloin v. Walcott, supra,* 434 U.S. at 255, quoting *Smith v. Organization of Foster Families, supra,* 431 U.S. at 862-63 (Stewart, J., concurring).

examination of actual impact on the child, are notoriously liable to be based only on someone's view that the parents' lifestyle is eccentric, unusual or unfortunate.

> "For example, courts have removed children because the parents were not married; because the mother 'frequent[ed] taverns' or had men visitors overnight; because the parents adhered to 'extreme' religious practices, or lived in a communal setting; or because the parent was a lesbian, a homosexual, or the mother of an illegitimate child. In none of these cases was there evidence of harm to the children." Wald, *supra*, 27 *Stan. L. Rev.* at 1033 (footnote citations omitted).

Only by focusing the fact finder on the need to determine harm can the potential for arbitrary action be diminished. Harm may not be measurable in every case with ruler-like precision; but the standard is a model of objectivity compared with an undirected inquiry into fitness at large.

Lastly, without a requirement of harm, a continuing danger exists that TPR proceedings will be perverted into means of punishing the parents for conduct that, however improper, is essentially unrelated to protection of the child. The automatic equation of incest with unfitness in this very case was, at best, nothing more than a groundless presumption that parents who are half-brother and half-sister are incapable of caring for an existing child.[60] At worst, the automatic equation of a "Class A misdemeanor" (J.S. App. 12a) with unfitness amounts to mere punishment of the parents, unrelated to protection for the child and therefore a form of punishment patently cruel and unusual.[61] Unless

[60]No evidence exists that half-sibling parents are inherently less affectionate or capable. In fact, the position of the Division and its trial experts is inconsistent with any such suggestion. See p. 10 and n. 16, above.

[61]No one can doubt that to terminate parental rights as punishment for a crime would be cruel and unusual under the Eleventh Amendment. See generally *Trop v. Dulles*, 356 U.S. 86 (1958).

parental conduct is shown to cause or threaten harm to the child, it is constitutionally irrelevant in a termination proceeding.

The constitutional requirement of harm to justify taking children from their parents has been recognized by the lower federal courts. Thus, in *Roe v. Conn, supra,* 417 F. Supp. at 779, a three-judge district court struck down a statute that permitted removal of a child from "an unfit or improper home," saying in part:

> "States . . . may abrogate [parental] rights only to advance a compelling state interest and pursuant to a narrowly-drawn statute restricted to achieve only the legitimate objective . . . . The State's interest, however, would become 'compelling' enough to sever entirely the parent-child relationship only when the child is subjected to real physical or emotional harm and less drastic measures would be unavailing."

Other courts have taken the same view.[62] This Court has not had occasion to specify the "showing of unfitness" that is a constitutional precondition to "forc[ing] the breakup" of a natural family, *Quilloin v. Walcott, supra,* 434 U.S. at 255; but its discussion "strongly suggests" that "actual or imminent harm to the child" is required before such intervention may be triggered. Developments, *supra,* 93 *Harv. L. Rev.* at 1319.

In the Indian Child Welfare Act of 1978, Congress expressly required a determination of harm before termi-

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[62] *E.g., Alsager v. District Court, supra,* 545 F.2d at 1137, in which the Eighth Circuit held that the state had "failed to exhibit the threshold harm necessary to give the state a compelling interest sufficient to justify permanent termination of the parent-child relationships." See also *State v. Robert H.,* 118 N.H. 713, 393 A.2d 1387, 1391 (1978) ("showing of specific harm" required); *Matter of Sherol A.S., supra,* 581 P.2d at 888 (termination permitted only to "protect children from HARM") (capitalized in original).

nation of parental rights may be ordered under state law for Indian children. See p. 33, n.54, above. The statute states:

> "No termination of parental rights may be ordered in such proceeding [under state law] in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualifed expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. §1912(f) (1978 Supp.).

Such a requirement of harm is equally feasible and appropriate here.

In this case, both lower courts found unfitness solely because the Does were half-brother and half-sister and the state legislature had made incest a crime. The Superior Court in its first opinion said that "the Court is prepared to rule at this time that the incestuous relationship between the father and mother is sufficient in and of itself for the termination of parental rights." J.S. App. 5b.[63] After the Delaware Supreme Court affirmed this determination on the explicit ground that "the General Assembly has made incest a Class A misdemeanor" and had declined to modify the provision in adopting a new criminal code. J.S. App. 12a-13a. Whether or not half-sibling marriage is a crime under Delaware law, the State has not legislatively found that half-sibling parents are necessarily incapable of raising existing children; and the State offered no evidence to support such a presumption or inference in this case. Moreover, this Court has repeatedly disallowed irrebuttable

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[63]On initial review, the Delaware Supreme Court remanded the case because the Superior Court had not made the further determination of "best interests" required by 13 Del. Code §1108(a). The Superior Court's second opinion was addressed explicitly to the best interests issue. J.S. App. 1d, 3d.

presumptions as a basis for denying constitutional rights.[64]

The determination that the Doe children's "best interests" were served by terminating parental rights similarly does not rest on any findings demonstrating existing or imminent harm to the children. Certainly no findings of harm were explicitly made either by the Delaware Superior Court or the Delaware Supreme Court, and explicit findings of harm are requisite to meet the constitutional standard.[65] Even if a finding of harm could be inferred in a case where the findings made permitted no other possible inference, certainly no such inference is rationally compelled by the findings actually made by the Superior Court with respect to the Doe children's best interests.

The principal findings of the Superior Court relate to the Does' alleged "pattern of living": "frequent moving from place to place," many jobs held by Mr. Doe for short periods, and "frequent[] resort to the obtaining of public financial assistance [by the Does] in order for them and their children to exist." J.S. App. 3d. The fact is that job changes, moves from one residence to another, and resort to welfare are the lot of a vast number of Americans.[66] Nothing in the Superior

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[64]For example, in *Stanley v. Illinois, supra,* 405 U.S. at 654-55, this Court held that the state could not irrebuttably presume that all unmarried fathers are unsuitable and neglectful parents. In *Cleveland Board of Education v. LaFleur, supra,* 414 U.S. at 645-46, the Court held unjustified an automatic and conclusive presumption that an expectant woman was incapable of working past an arbitrary date.

[65]Absent such findings, there is no way to be certain that the proper constitutional standard has been applied by the court terminating the rights of the parents. Such findings should serve the same role as a determination of malice or reckless disregard in a libel case affecting First Amendment rights. *E.g., Rosenbloom v. Metromedia, supra,* 403 U.S. 29.

[66]According to the 1979 *Statistical Abstract of the United States,* between 20 and 30 million people lived below the poverty level in this country each year between 1968 and 1977, the last reported year (*id.* at 462); unemployment has generally been at a rate of 5 to 8 percent (*id.* at 404); and between 1965 and 1970, 47 percent of the population moved. *Id.* at 39.

Court's findings distinguishes the Does in this respect from thousands of other families, and surely nothing demonstrates that the children were harmed or threatened with imminent harm by this "pattern of living."[67]

This Court has itself noted the dangerous tendency, among those who administer the official child care system, to assume that "the natural parents' poverty and life style [is] prejudicial to the best interests of the child." *Smith v. Organization of Foster Families, supra,* 431 U.S. at 834. It is not surprising that "perhaps the most prevalent characteristic of families charged with neglect is poverty." Areen, *supra,* 63 *Georgetown L.J.* at 888. Only by insisting on clear evidence of actual or imminent harm to the child, which certainly has not been shown in this case, can courts prevent the dangerous and destructive confusion between being poor and being an unfit parent.

None of the other "facts" mentioned by the Superior Court demonstrates harm to the children. The half-sibling relationship proves nothing whatever about the parents' capacity to raise their existing children. See p. 10, n.16 and p. 39, above. The prior conviction of Mr. Doe for offensive touching involved a charge flatly denied by Mr. Doe (see Tr. 108-09, Dec. 7, 1976) relating to alleged misconduct occurring three years prior to the 1976 TPR proceeding; and the Superior Court made no independent finding concerning the charges and no finding whatever of harm to any of the children. Finally, Mr. Doe's alleged "alcoholic problem" (J.S. App. 2d) concerns an episode occurring in 1973, at a time when the Doe children were not even in their parents'

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[67]There is one piece of evidence in the record that directly discloses harm to any of the children; and that is the harm inflicted on Amy, the eldest child, as a result of her treatment while in the *State's* custody. See p. 10, above.

care (Tr. 62, Dec. 7, 1976); and Mr. Doe's employer testified at trial that Mr. Doe was invariably sober even though he was employed in a facility where liquor was available. Tr. 389-92, Dec. 21, 1976.

This is in substance a case in which five young children were permanently barred from a home admittedly stable, in both location and employment of the parents, at the time of the TPR order (see J.S. App. 3d) with no finding of actual or imminent harm to the children. The principal expert testimony for the State was provided by two psychiatrists who had never examined the children or the parents. See p. 9, above. Instead, they both testified based on a double hearsay "social report"[68] so untrustworthy that the Delaware

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[68]For example, the State's principal psychiatrist testified in response to a hypothetical question, based on the stated assumption that "all material facts contained [in the social report] are true," that termination served the children's best interests. Tr. 12-13, 15, Dec. 6, 1976. Asked for his reasons, the psychiatrist began as follows: "The reasons are based on the report again and are based on the instability, geographic instability, as well as the emotional instability, of multiple moves. There is also indicated that there did exist an incapacity — really an inability of the two parents to provide this. The nurturance and the stability that are required for the optimum, let alone average, developments of the ordinary human infant would seem, on the basis of that record, to be beyond that capacity." *Id.* at 15-16. The psychiatrist continued in this vein until finally he was asked about the parents' capacity for change; he then replied: "I saw no evidence in the summary [sic: social] report of the capacity for change." *Id.* at 20.

The other State psychiatrist, who testified more briefly, gave his opinion in response to a hypothetical question that read as follows: "Assuming, for the purposes of this question, that the facts contained in that report are true and correct, based upon your professional qualifications and based upon your analysis of the report, and assuming the facts contained therein to be true and accurate, do you have an opinion of Mr. and Mrs. [Doe]'s ability to continue to exercise parental rights over their five children?" Tr. 181, Dec. 7, 1976.

Supreme Court later found it inadmissible (J.S. App. 11a-12a) even though that court improbably deemed its admission to be "harmless error." See p. 11, n.18, above.

By contrast, the psychologist who had actually examined the Does and several of the children testified that parental rights should not be terminated and that he had found a "good relationship" between the parents and their children, as well as a "strong desire" by the Does to have their children back. Tr. 457, Dec. 21, 1976. There was also testimony that the children were generally normal (Tr. 129-31; Dec. 7, 1976), except that the eldest child had suffered from her foster home experience. Tr. 241-43; Dec. 8, 1976. The Superior Court, of course, made no findings of harm, so the question whether the record would even support findings of harm does not arise.

This Court's "decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[69] Required findings of actual or imminent harm would not impose an extraordinary or unjustified burden upon the State,[70] when considered in relation to the seriousness of the charge (that parents are unfit to raise their own children) and the proposed remedy (that they be permanently severed from further contact).

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[69]*Moore v. City of East Cleveland, supra,* 431 U.S. at 503 (footnote omitted). See also *Smith v. Organization of Foster Families, supra,* 431 U.S. at 842.

[70]Indeed, Congress has in substance prescribed such findings in the Indian Child Welfare Act of 1978. See pp. 38-39, above. Even if the requirement were burdensome, which it is not, "the Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois, supra,* 405 U.S. at 656 (footnote omitted). See also *Cleveland Board of Education v. LaFleur, supra,* 414 U.S. at 646.

Rather, such a requirement would ensure that courts confront and resolve the cardinal question whether there actually exists that compelling state interest — the protection of the children against harm from their parents — which alone justifies "the dismemberment of [the] family." *Stanley v. Illinois, supra,* 405 U.S. at 658.

CONCLUSION

For the reasons stated, the judgment below should be reversed.

Respectfully submitted,

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APPENDIX A

United States Constitution, amendment XIV, section 1, clause 3, provides:

> "nor shall any state deprive any person of life, liberty, or property, without due process of law."

13 Delaware Code § §1101-1113 (1974 and 1978 Supp.), provide:

§1101. Definitions.

As used in this chapter:

(1) "Abandoned" shall be interpreted as referring to any child who, for a period of 6 months, has not received any regular and reasonable financial help from his parent or parents or any person having parental rights or responsibility and on whose behalf no substantial contacts have been initiated by his parent or parents or any person having parental rights or responsibility during that period.

(2) "Authorized Agency" means any agency licensed by the Department of Health and Social Services of this State to place children for adoption, or any agency duly approved, certified, recognized or licensed by the proper authority of any other state in which that agency is located to place children for adoption.

(3) "Child" means any male or female who has not attained his or her 18th birthday.

(4) "Mentally incompetent" shall be interpreted as referring to a parent who is unable to understand and discharge the natural and regular obligations of care and support of a child by reason of mental illness, psychopathology, mental retardation or mental deficiency.

(5) "Natural father" means the biological male parent of a child.

§1102. Jurisdiction and venue.

(a) The Superior Court shall have jurisdiction of proceedings under this chapter to terminate parental rights.

(b) A petition for termination of parental rights may be filed in the Superior Court of any of the following counties:

(1) The county in which the petitioner resides;

(2) The county in which the organization having legal or physical care, custody or control of the child involved is located;

(3) The county in which the child involved is located.

(c) Whenever the Superior Court shall assume jurisdiction of a child for the purposes of this chapter, it shall be deemed to have retained jurisdiction for the purposes of proceeding under Chapter 9 of this title relating to adoption.

§1103. Grounds for termination of parental rights.

The procedure for termination of parental rights for the purpose of adoption or, if a suitable adoption plan cannot be effected, for the purpose of providing for the care of the child by some other plan which may or may not contemplate the continued possibility of eventual adoption, may be initiated whenever it appears that:

(1) The parent or parents of any child, or the person or persons or organization holding parental rights over such child, desires to relinquish such parental rights; or

(2) Any child has been abandoned; or

(3) The parent or parents of any child or any person or persons holding parental rights over such a child are found by the Court to be mentally incompetent and, from evidence of 2 qualified psychiatrists selected by

the Court, found to be unable to discharge parental responsibilities in the foreseeable future. The Court shall appoint a licensed attorney as guardian ad litem to represent the alleged incompetent in the proceeding;

(4) The parent or parents of any such child, or any person or persons or organization holding parental rights over such child are not fitted to continue to exercise parental rights; or

(5) Both parents of a child are deceased.

Unless adoption is contemplated, the termination of 1 parent's parental rights by the other parent shall not be granted if the effect will be to leave only 1 parent holding parental rights, unless the Court shall find the continuation of the rights to be terminated will be harmful to the child.

§1104. Persons eligible to petition for termination of parental rights.

A petition for the termination of parental rights may be filed by any of the following:

(1) The mother or the natural father, or both, of a child born out of wedlock;

(2) Both parents of a child born in wedlock if both parents are living;

(3) The surviving parent of a child born in wedlock, if 1 parent is dead;

(4) The mother or the natural father, or both, if the mother's legal husband at the time of the conception or birth of the child was not the natural father of the child. In the absence of evidence to the contrary, a notarized statement of the legal husband that he is not the father of the child shall be prima facie proof thereof;

(5) One parent alone if the other parent is incompetent by virtue of mental illness or mental retardation, or has abandoned the child, or is not fit to continue to exercise parental rights;

(6) A blood relative of a child whose parents are deceased or who are incompetent by virtue of mental illness or mental retardation, or who have abandoned the child, or who are not fitted to continue to exercise parental rights;

(7) An authorized agency or the State Department of Health and Social Services.

§1105. Contents of petition.

(a) The petition for the termination of parental rights shall state the:

(a) Name and place of residence of the petitioner or petitioners;

(2) Name, sex and date of birth of the child;

(3) Relationship of the petitioner or petitioners to the child or the fact that no such relationship exists;

(4) The names and addresses of the parents of the child if born in wedlock;

(5) If the child was born out of wedlock, the name and address of the mother and her marital status at the time of the child's conception and birth, and, in the event she was married at the time of the child's conception or birth, the name and address of the mother's husband at those times, and an affidavit by the mother setting forth either (i) the name and last known address of the natural father, or (ii) a statement that the mother knows the name of the natural father but is unwilling to disclose the name of the natural father, or (iii) a statement that the mother does not know the name of the natural father, or (iv) the name of the natural father, and a statement that the mother has

never known his address;

(6) Name and last known address of the person or persons or organization holding parental rights and the name and address of the person or persons or organization having the care, control or custody of the child;

(7) Grounds for termination of parental rights;

(8) Name and address of the person or persons or of the authorized agency or officer thereof or the State Department of Health and Social Services or officer thereof for whom or for which parental rights are requested;

(9) In addition to other pertinent information, the petition shall, if the name and/or address of the natural father is not included, furnish detailed information concerning the efforts made to identify and locate the natural father so as to enable the Court to determine what further steps, if any, should be taken.

(b) Any consents required in §1106 of this title shall accompany the petition as exhibits.

(c) In any case in which a petition for the termination of parental rights has been filed and an authorized agency or the State Department of Health and Social Services is a party to the proceedings, there shall be attached to the petition a social report.

§1106. Consent requirements; waiver of notice.

In the case of proceedings based on §1103(1) of this title:

(1) A petition for the termination of parental rights shall be accompanied by the duly notarized consent in writing of the person or persons or organization holding parental rights;

(2) The consent provided for in subdivision (1) shall be required from:

a. Both parents of a child born out of wedlock; provided, however, that the consent of the alleged natural father need not contain an admission that he is the father. In the event that the named natural father disclaims paternity, an affidavit signed by him to that effect shall be attached to the petition in lieu of a consent from the natural father. It is further provided that in the event of a petition containing statements described in §1105(a)(5)(ii), (iii) or (iv) of this title, after a hearing in which it is established on the record that the mother and father of the child are not living together as husband and wife openly and that they have not done so nor married since the birth of the child, the Court may, following consideration of the social report, dispense with the requirement of the father's consent in compliance with §1113 of this title.

b. Both parents of a child born in wedlock except as provided in subparagraph c. if both parents are living, or from the survivor, if 1 is deceased, regardless of the marital status of the parents at the time the petition is presented;

c. The mother and the natural father, if the mother's legal husband at the time of the conception or birth of the child was not the natural father of the child. In the absence of evidence to the contrary, a notarized statement of the legal husband that he is not the father of the child shall be prima facie proof thereof. If such a notarized statement of the legal husband cannot be obtained, a notice of hearing shall be sent to him as provided in §1107 of this title. The consent of the natural father is subject to paragraph a. above;

d. Any other person or persons or organization holding parental rights;

e. One parent alone if the other parent is incompetent by reason of mental illness or mental retardation, or has abandoned the child, or is not fitted to continue to exercise the parental rights.

(3) If the individual in whom the right to consent exists is under the age of 21 years, this fact shall not be a bar to the giving of consent nor render the consent when given invalid;

(4) Every petition shall be accompanied by a formal written consent executed by the person or persons or organization for whom or for which parental rights are requested;

(5) If the person or persons or organization holding parental rights wish to waive their right to any and all notice of hearing or right to appear at such hearing, the petition shall be accompanied by a notarized statement to this effect executed by the person or persons or organization holding parental rights;

(6) Consent by the natural father may be executed either before or after the actual birth of the child involved.

§1107. Hearing procedure; notice of hearing; report.

(a) When a petition for the termination of parental rights is filed in which an authorized agency or the State Department of Health and Social Services is a party to the proceedings, the Court shall set a date for a hearing thereon, and shall cause notice of the time, place and purpose of the hearing to be served upon the parent or parents, person or persons or organization holding parental rights at his or their last known address; provided, however, no such notice shall be necessary if a waiver executed by the parent or parents, person or persons or organization holding parental rights has been filed with the petition, in accordance with the

provisions of §1106(5) of this title. The Court may require notice to be served upon any other person or organization.

(b) If the Court shall find that personal service within the State cannot be accomplished upon the parent or parents, person or persons or organization holding parental rights, the Court shall then cause notice of the time, place and purpose of the hearing to be published once a week, for 3 successive weeks, in such newspapers of the county, 1 or more, as the Court may judge best for giving the parent or parents, or person or persons or organization holding parental rights notice, the formal wording of said notice to be approved by the Court. Such publication shall constitute conclusive evidence of service and a hearing will then proceed at the time and date set with or without the appearance of the parent or parents, person or persons or organization so notified. Publication shall also be made in the locality in which the parent or parents, person or persons or organization holding parental rights is believed to be located if different from the county where the publication just described has been caused. If any publication is ordered pursuant to this subsection, the Court shall also order that the Prothonotary, at least 3 weeks prior to the hearing, shall send by regular and registered or certified mail to the parent or parents, or person or persons or organization holding parental rights, at the address or addresses given in the petition, a copy of the same notice, or a similar notice of the time, place and purpose of the hearing.

(c) Personal service at any time prior to the hearing shall be sufficient to give jurisdiction.

(d) When a petition for termination of parental rights is filed, and an authorized agency or the Department of Health and Social Services, Division of Social Services, is not a party to the proceedings, the Court shall, before any hearing,

order a social study and report on the petition by an authorized agency or by the Department of Health and Social Services, to be filed within 4 months, subject to such additional time as the Court shall determine is reasonably required. The Court shall set a date for hearing to take place after the report is to be filed and notice shall be accomplished as outlined above. Any social report filed with the petition, or subsequently, as described above in this subsection, shall include the information specifically referred to in §1105(c) of this title, where indicated.

(e) All hearings shall be held before the Court privately, but for reasons appearing sufficient to the Court the hearing in any particular case may be public.

§1108. Order of termination and transfer of parental rights.

(a) Should the Court find the termination of existing parental rights and their transfer to be in the best interests of the child, it shall make an order terminating such rights in the parent or parents, person or persons or organization in which they have existed and transferring them to some other person or persons or authorized agency or the State Department of Health and Social Services as may, in the opinion of the Court, be best qualified to receive them.

(b) If a child is abandoned by 1 parent only, the rights of such parent may be terminated without affecting the rights of the other.

(c) In the case of the termination of the parental rights of 1 parent only, for the purposes of adoption by a stepparent, upon the finding described in paragraph (a) of this section, the Court may, in its discretion, in lieu of a final order enter

an interlocutory order which the Court shall make final at the completion of adoption proceedings, provided that any such interlocutory order which does not become final within 18 calendar months of the issuance thereof shall, upon the expiration of such 18 calendar month period, become null and void.

§1109. Appeal.

The petitioner, if the petition is not granted; or any person or organization whose parental rights have been terminated by the order, may, at any time within 30 days after the making and entry of such decree, take an appeal therefrom to the Supreme Court.

§1110. Court costs.

All Court costs including costs of giving notice and advertising shall be paid by the petitioners.

§1111. Confidential nature of records.

All records and dockets pertaining to any termination shall be confidential and shall be kept by the Prothonotary in a sealed container which shall be opened only by the order of a Judge of the Superior Court.

Anyone wishing to inspect any of the papers filed in connection with any termination shall petition a Judge of the Superior Court setting forth the reasons for the inspection. The Judge may refer the petition to the State Department of

Health and Social Services or to an authorized agency for investigation and report. If, in the opinion of the Court, the information is necessary, and the interests of the child, the natural parents or the adoptive parents will not be prejudiced by its disclosure, the Court shall issue an order permitting the release of the information and setting forth the terms under which it shall be released.

§1112. Effect of termination of parental rights.

Upon the issuance of an order terminating the existing parental rights and transferring such parental rights to another person or organization, the effect of such order shall be that all of the rights, duties, privileges and obligations recognized by law between the person or persons whose parental rights are terminated and the child shall forever thereafter cease to exist as fully and to all intents and purposes as if the child and the person or persons whose parental rights have been terminated were and always had been strangers. The person or organization to whom said parental rights are transferred shall have custody and guardianship of the child but such custody and guardianship shall terminate automatically upon the entry of another order transferring parental rights or on an order of adoption.

§1113. Interpretation.

This chapter is designed to achieve without undue delay the paramount objective of the best interest of the child, and all questions of interpretation shall be resolved with that objective in mind.

APPENDIX B

Mich. Comp. Laws Ann. §722.23 (1979 Supp.) provides:

"Best interests of the child" means the sum total of the following factors to be considered, evaluated and determined by the court:

(a) The love, affection and other emotional ties existing between the competing parties and the child.

(b) The capacity and disposition of competing parties to give the child love, affection and guidance and continuation of the education and raising of the child in its religion or creed, if any.

(c) The capacity and disposition of competing parties to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home.

(f) The moral fitness of the competing parties.

(g) The mental and physical health of the competing parties.

(h) The home, school and community record of the child.

(i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.

(j) Any other factor considered by the court to be relevant to a particular child custody dispute.

Tex. Code Ann. Tit. 2 §15.02 (1979) provides:

A petition requesting termination of the parent-child relationship with respect to a parent who is not the petitioner may be granted if the court finds that:

(1) the parent has:

(A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return; or

(B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months; or

(C) voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months; or

(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child; or

(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child; or

(F) failed to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing of the petition; or

(G) abandoned the child without identifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence; or

(H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth; or

(I) contumaciously refused to submit to a reasonable and lawful order of a court under Section 34.05 of this code; or

(J) been the major cause of:

(i) the failure of the child to be enrolled in school as required by the Texas Education Code; or

(ii) the child's absence from his home without the consent of his parents or guardian for a substantial length of time or without the intent to return; or

(K) executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by Section 15.03 of this code; and in addition, the court further finds that

(2) termination is in the best interest of the child.

APPENDIX C

Indian Child Welfare Act of 1978, 25 U.S.C. § §1912(e), (f) (1978 Supp.), provides in pertinent part:

> (e) No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
>
> (f) No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

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No. 79-5932

JOHN DOE and JANE ROE,

Appellants,

v.

THE STATE OF DELAWARE,

Appellee.

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v.

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Appellee

ON APPEAL FROM THE SUPREME COURT OF DELAWARE

QUESTIONS PRESENTED FOR REVIEW

1. Was a now repealed Delaware statute which predicated termination of parental rights on dual findings of parental unfitness and the best interest of a child impermissibly vague under the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

2. Do children have an independent constitutional right to representation in termination of parental rights proceedings? [1]

3. In non-penal actions like termination of parental rights proceedings is some greater standard of proof than a preponderance of the evidence required?

4. Must termination of parental rights statutes be measured by the compelling state interest test under the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

1. This question was not raised by appellants rather it has been interjected by the *amici*.

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J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child, 105-111 (1973) 25, 31

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The former 13 *Del. C.* § 1103(4) under which this case was decided is set out in Appendix A to this brief. The current statute, 13 *Del. C.* § 1103(5), governing termination of parental rights proceedings is set out at Appendix B to this brief.

STATEMENT OF THE CASE

John Doe and Jane Roe, appellants, are the natural parents of the five minor children who are the focus of this matter.[2] The appellee Division of Social Services (Division) has the duty to seek out minors in need of care and protection in Delaware. 31 *Del. C.* ch. 3.

On several occasions in the years prior to the institution of TPR proceedings in 1975, the Family Court of the State of Delaware awarded legal custody of Doe and Roe's children to the Division. Finally after a full five day hearing at which evidence was adduced concerning the family's chaotic and nomadic home environment, Doe's poor employment record, his criminal record and history of alcohol problems, as well as Roe's emotional detachment from the children, the Superior Court terminated Doe and Roe's parental rights having found them unfit parents and having concluded that such action was in the best interests of Amy, Bill, Charles, David and Ellen.[3] The Delaware Supreme Court affirmed.

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2. Doe is the half-brother of Roe. Although not married, they lived together and held themselves out to the community as husband and wife (Roe was known as Mrs. Doe) at all time relevant to this action. Their children Amy, Bill, Charles, David and Ellen ranged in age from four years to nine months old when the TPR (termination of parental rights) action was filed in 1975. These children are now nine to five and a half years of age. They have not had any contact with their parents since 1975. Roe is now married to another man and lives with his child in Delaware. Doe presently lives in Georgia. He has not lived in Delaware for more than two years. All that Doe and Roe presently seek is "contact" with their children. See Affidavits of Doe and Roe in Support of Motion to Proceed in Forma Pauperis in this action.

3. The Superior Court previously had entered an order terminating parental rights solely on the basis of Doe and Roe's criminal incestuous relationship. The Delaware Supreme Court remanded with directions to consider whether termination was "in the best interests of the children."

The Division had a long history of providing supportive services to the Doe family. Early in 1972, Doe asked the Division to help find a place for Roe, Amy, and him to live.[4] After the birth of Bill, Doe and Roe asked the Division in September 1972 to provide a "decent home" for the children.[5] Doe had been fired from his job and the family had been evicted from its home and was living in a single room at a roominghouse.[6] On occasion, both before and after September 1972, Doe and Roe received public assistance (even at times when their children were in foster care).[7] When they were initially denied cash assistance in September 1972, their social worker made arrangements for Doe to have a fair hearing to challenge the denial.[8] After the Family Court approved the voluntary transfer of custody agreement, the children were placed in foster homes where they remained for about six months.[9] When Doe and Roe brought their marital difficulties to the attention of the Division they were referred to the marriage counseling service at Catholic Social Services.[10]

While Amy and Bill were in the Division's custody, Doe became intoxicated. He was violent and disruptive and, according to a complaint filed by Roe, threatened to kill her and accused her of running around with other men. As a result Doe was admitted to the Delaware State Hospital for treatment. After ten days, Doe signed himself out of the hospital. He was given medication and

4. Tr. 58.

5. Tr. 64.

6. Tr. 122-123.

7. Tr. 496-497.

8. Tr. 125-126.

9. Tr. 129.

10. Tr. 124.

referred to out-patient services at the mental hygiene clinic near his home but only kept one appointment.[11]

The Division continued its frequent contacts with Doe and Roe after Amy and Bill were placed in foster care,[12] visiting them several times a month and working with them so that the children could be returned to their home as soon as possible. After the Does made adequate housing arrangements, Amy and Bill were returned home in early 1973.[13] Doe had found new employment and the family was renting a "nice" home.[14] A week after Amy's return Doe quit his job, found another from which he was soon fired, and the family moved from the home in the middle of the night.[15] Doe then found work on a local dairy farm and the family moved into a tenant's cottage on the farm. While the house was "fairly decent" and adequate for the Does, their sister, her four children and her boyfriend moved in with them. The three bedroom house then accommodated two couples and six young children.[16] Within a month to six weeks Doe was fired for being unreliable. His employer could not depend on him to get in on time to milk the cows.[17]

The Does continued to drift from one abode to another, usually living in minimally adequate to poor housing. Between 1972 and 1974 alone, they lived in

11. Tr. 62-63, 184.

12. Tr. 123-124. The social worker observed that the Does "didn't seem overly concerned about the placement of the children." Tr. 123.

13. Tr. 129.

14. Tr. 128.

15. Tr. 130; 142-143.

16. Tr. 130-131.

17. Tr. 66-70; 117-118.

nineteen separate locations in eleven different towns.[18] During that period Doe worked only intermittently.[19] He held several jobs for periods between one day and two weeks.[20] Doe was discharged at times for drunkenness.[21] Other times he quit for no apparent reason and without another job prospect. He quit one job just after the birth of Charles, the third child.[22] Doe left other jobs at times when he lacked the money to pay the family's rent.[23]

Due to Doe's sporadic employment record the family was often in dire financial need.[24] The Division, in addition to providing public assistance on several occasions, periodically arranged for emergency cash assistance so that they could purchase food or assisted them in obtaining food from other sources.[25]

In 1973 three individuals familiar with the Doe's home life, including one of their sisters with whom they had shared living quarters, volunteered to Doe's social worker that he had been sexually toying with two year old Amy.[26] The Division petitioned the Family Court of Delaware to remove Amy, Bill and Charles from the home. That petition was granted.[27] A criminal complaint alleging sexual assault was filed against Doe. He and Roe then fled to Maryland. During their four month

18. Tr. 141-142.
19. Tr. 65; 79-82; 87.
20. Tr. 141-143; 189.
21. Tr. 142; 184.
22. Tr. 185.
23. Tr. 182.
24. Tr. 71; 85.
25. Tr. 132.
26. Tr. 155.
27. Tr. 136.

absence from Delaware neither Doe nor Roe inquired about the welfare of their children.[28] After a trial, the Family Court convicted Doe of the lesser included crime of offensive touching and of the crime of child neglect.[29] The Does continued to live in Maryland for about a year after Doe's conviction and they made one contact with Amy, Bill and Charles during that period.[30]

After a while the Doe's returned to Delaware with their infant twins David and Ellen. In February 1975 custody of those children was granted to the Division after Doe was convicted of the crime of incest.[31]

The Division social worker who worked closely with the Does between 1972 and 1974 concluded on the basis of her observation of Doe and Roe, that they simply lacked the capacity to provide their children with basic care. She noted that Roe never demonstrated a strong emotional attachment with her children.[32] That observation was confirmed by another social worker who described Roe's relationship with her children as "detached".[33] The only strong familial attachment which

28. Tr. 138.

29. Tr. 77; Two witnesses testified at the Family Court trial that Doe repeatedly had "French kissed" Amy over her verbal objections and one of these witnesses also testified that he had directed this two year old on many occasions to expose her vaginal area and encouraged her to engage in acts of sexual self-gratification. Ex. 24 to TRP hearing. Tr. 515. An expert child psychologist who testified at the TPR hearing stressed the harmful effects on the child when a parent fails to channel and help his child sublimate infantile sexual urges. Tr. 17-18; 30-32.

30. Tr. 79.

31. Tr. 91; 111.

32. Tr. 140.

33. Tr. 168.

the Division was able to observe existed between Doe and Amy. That relationship was characterized as "unhealthy," though.[34]

Testimony of three expert witnesses at trial definitively established that Doe and Roe were incapable of adequately caring for their children and that it was in the children's best interests that the termination petition be granted. Adaline R. Kinkaid, a psychologist, observed and tested the five children of Doe and Roe. She determined that Amy, the oldest child, was frightened and insecure and still bore the scars of her earlier experiences. However, Amy had been able to form a psychological bond with her foster parents and was secure in her present foster home.[35] Miss Kinkaid and the two psychiatrists who testified at the trial agreed that Amy's poor abilities in the area of social skills contrasted sharply with her average to superior intellectual abilities.[36]

Bill was found to have overcome his difficulties and was not as emotionally damaged as Amy, who spent more years in the home of Doe and Roe than her siblings.[37] Charles, who was mildly retarded, appeared to be settled in his present home but lacked the ability to adjust to further changes. David and Ellen, the twins who had lived most of their lives in foster homes, were characterized as normal children whose needs were being met in their present environment.[38]

Dr. T. Richard Huxtable, Jr., Chief of Forensic Psychiatry at the Delaware State Hospital, concluded that

34. Tr. 140.

35. Tr. 238.

36. Tr. 29; 186; 237.

37. Tr. 238.

38. Tr. 239.

Doe and Roe were incapable of raising children.[39] He characterized Doe as a "sociopath" who lacked a sense of responsibility to a degree that was "overwhelming".[40] Both Dr. Huxtable and Dr. Charles Cook, a child psychiatrist, ascribed the lessening of appellant's chronic pattern of instability to the fact that they were no longer subject to the stresses of parenthood.[41] Dr. Cook determined that Doe and Roe lacked the capability to function as nurturing parents as well as the ability to develop adequate parenting skills.[42] He described the environment which appellants had provided their children as "chaotic."[43]

As appellants indicate, Dr. Malvin Gelof, a psychologist, expressed his belief that Doe and Roe were sufficiently intelligent to raise children.[44] He could not, however, explain why appellants had not been able to provide less than chaotic environment for their children in the past nor whether a termination order would be in the children's best interests.

After this evidence was considered by the Superior Court, it concluded that Doe and Roe were incapable of providing proper care for their children, citing the parents' employment records, the frequent changes in home surroundings, the moral atmosphere of the home where the criminal incestuous relationship continued in contravention of the order of the Family Court and the offensive

39. Tr. 182.

40. Tr. 187.

41. Tr. 35-36; 196.

42. Tr. 20. Dr. Cook testified that the geographic and emotional instability of the Does indicated an inability to provide the nurturance and stability required for even average human infant development. Tr. 15-17.

43. Tr. 30.

44. Tr. 457.

touching conviction of Doe for toying with Amy. In their totality these facts provide ample evidence to support a finding that termination was in the best interests of the children. These same facts show Doe and Roe's unfitness to continue to exercise parental authority over the children. The Delaware Supreme Court did not err in affirming the judgment of the trial court in terminating Doe and Roe's parental rights under the former statute.

With the repeal of former 13 *Del. C.* § 1103(4) and the enactment in 1980 of a new statutory standard for termination of parental rights which requires a showing of failure to plan adequately for the child's physical needs or mental or emotional health, of a prior placement history, and that there is little likelihood that the conditions which resulted in the child's placement will be remedied (13 *Del. C.* § 1103(5))[45] the facts described above would still compel termination. Despite the parents' showing a relative stability during the year when they were without custody of any of their children, that very stability was attributed by Drs. Huxtable and Cook as resulting from the parents ability to relate to each other in the absence of any and all of their five children[46] whose presence always seemed to reintroduce the pressures of child rearing with which they were unable to cope.

The parents' continuing interest in their children has been tenuous indeed and the legal operation of freeing the five children who have not seen their parents since 1975 so that these children may be legally made part of the adoptive homes in which they have lived in the interim is an interest which should not be disregarded by the Court because the parents, no longer living together nor in the same part of the Country, seek to reestablish "con-

45. See Appendix B.

46. See footnote 41 *supra*.

tact" with the children, whatever that may be. At oral argument of this case before the Delaware Supreme Court in 1978 counsel for the parents acknowledged to that Court that he did not know where the parents were located. Only with the filing of the Motions to Proceed in Forma Pauperis in this Court has counsel for the parents been able to identify their locations. And now they ask for "contact". The Division asks that the decision of the Delaware Supreme Court be affirmed so that adoption proceedings which have been held in abeyance pending final disposition of the matter may go forward and these children may have more than simple "contact" with biological parents whom they have not known for five years and may be allowed to become full members of the loving and nurturing adoptive families with whom they have lived since prior to the TPR hearing.

SUMMARY OF ARGUMENT

The former Delaware TPR statute (13 *Del. C.* § 1103(4) repealed) was not unconstitutionally vague. It required a showing of parental unfitness as well as a demonstration that the termination of parental rights was in the best interests of the child or children involved. This dual test, long followed in Delaware, was recognized by this Court in *Quilloin v. Walcott,* 434 U. S. 246 (1978). The standards are phrased in common language not beyond the understanding of the average parent and certainly are not so technical that a reasonable parent or custodian would be left adrift in his efforts to comply for the purpose of raising his children. Furthermore the Delaware Supreme Court recognizing, as do the parents here, that each case is fact specific has enumerated criteria for testing the application of the statutory standard. *See, e.g. In re Dingee,* 328 A. 2d 139 (Del. 1974). Due Process does not compel a perfect statute; it simply requires one which is capable of being understood by those who it covers and who must apply it. The former Delaware TPR statute satisfied those requirements.

The children here involved have no constitutional right to independent representation now in this Court for the first time in these proceedings. Nor did they have a constitutional right to counsel or the appointment of a *guardian ad litem* in the State court proceedings. As a practical matter, developments in procedure and the Division's practices since the trial of this matter in 1976 now assure the appointment of a *guardian ad litem* in abuse and neglect proceedings in the Delaware Family Court. Delaware has also institutionalized by statute a foster care review procedure which will ensure that an independent entity with the power to institute actions before the Delaware Family Court will review and make placement recommendations for children in foster care.

Extraordinary standards of proof should not be required in TPR proceedings because they are not penal in nature and because the balancing of the competing interests of the child requires that he not be the forgotten element in the equation. He is not the prize awarded to the victorious party. Rather, he is the person in whose interests the action itself is brought. To require the State to show unfitness beyond a reasonable doubt, as the parents argued in the State Courts, or by clear and convincing evidence penalizes the child who should not be shackled to a family relationship of "contacts" only like this one apparently will be.

Finally, there is no substantive due process consideration which should impell this Court to require as showing of a compelling state before a state interest may finally separate the parents and their children. The State has a legitimate interest in severing the family relationship where such is necessary to protect the welfare of the child. Furthermore, to require that a showing of imminent and significant harm to the children be made to justify termination proceedings strips these defenseless individuals of any real opportunity of receiving protective services from the State and final placement in a nurturing environment where they can belong to a family without fearing for their physical and emotional well being.

ARGUMENT

I. The Former Delaware TPR Statute Was Not Unconstitutionally Vague or Indefinite.

It is axiomatic that a state must tread carefully when it seeks to alter the integrity of the family.[47] Nonetheless, it is also well established that neglectful parents may be separated from their children. *Stanley v. Illinois,* 405 U. S. 645, 652 (1972). Here, substantial evidence has established that the interests of the parents in retaining parental rights is inimical to the "best interests" of these children. Proof of both parental unfitness and the fact that termination lies in the best interests of the Doe and Roe children clearly satisfies the requirement of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In *Quilloin v. Walcott,* 434 U. S. 246, 255 (1978), this Court cited an earlier concurrence by Mr. Justice Stewart which set forth the following dual proof requirement in cases such as this one:

> We have little doubt that the Due Process Clauses would be offended "(if) a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." *Smith v. Organization of Foster Families,* 431 U. S. 816, 862-863, 53 L. Ed. 2d 14, 97 S. Ct. 2094 (1977).

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47. Appellants and *amici* cite the Court to a series of cases which restrict state intrusion into family life. However, none of them reflect the central familial issue in a TPR proceeding, the inherent conflict between the interests of the parents and the children. *Compare* Quilloin v. Walcott, 434 U. S. 246 (1978) (statute declares unwed fathers unfit as matter of law); Prince v.

The dual fitness/best interests test had become a settled principle of Delaware TPR law long before *Quilloin* and *Smith*.[48]

The Delaware Supreme Court has been careful to explicate these terms so that they are comprehensible by parents and their application by the trial court cannot be

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47. (Cont'd.)

Massachusetts, 321 U. S. 158 (1944) (statute prohibits minor's sale of religious literature); Cleveland Board of Education v. LaFleur, 414 U. S. 632 (1974) (school regulations require early termination of pregnant teachers); Moore v. East Cleveland, 431 U. S. 494 (1977) (ordinance prohibits extended families in single family dwellings); Wisconsin v. Yoder, 406 U. S. 205 (1972) (mandatory school attendance laws conflict with religious principles); Pierce v. Society of Sisters, 268 U. S. 510 (1925) (school attendance laws preclude parochial school attendance); Meyer v. Nebraska, 262 U. S. 390 (1923) (state law prohibits teaching in German language).

48. Parental unfitness has been statutory ground for protecting children since 1907. In re Three Minor Children, 406 A. 2d 14, 16 (Del. 1979). Both unfitness and the best interests must be shown in a TPR. Cline v. Hartzler, 227 A. 2d 210 (Del. 1967). The best interest factor in TPR's is presently codified at 13 *Del. C.* § 1113. The best interest test has been applied consistently by Delaware courts when dealing with issues affecting the custody and control of children. *See e.g.* Smith v. Smith, 45 A. 2d 879 (Del. Super. 1946) (custody; good of child is "primary or leading consideration"); In re Fusco, 127 A. 2d 468 (Del. Orph. 1956) (TPR; "best welfare of the child is the paramount concern"); Nelson v. Murray, 211 A. 2d 842 (Del. 1965) (custody; "paramount concern is the present and future welfare of the children"); In re Two Minor Children, 231 A. 2d 475 (Del. 1967) (visitation; best interest of children is "primary consideration"); In re E., 239 A. 2d 626 (Del. 1968) (TPR; best interests of child is "prime and overriding concern."). In re One Minor Child, 295 A. 2d 727 (Del. 1972) (visitation; best interests of child supersedes "desires of parents.").

arbitrary. In doing so, the Delaware Supreme Court has ensured that the evils in the statute of which appellants complain: failure to give adequate warning of proscribed conduct and standardless and discriminatory application, cannot occur. Assuming *arguendo* that the statutory language is unconstitutionally vague on its face, that imprecision may be cured by narrowing court interpretations. *Lake Carriers' Assn. v. MacMullan,* 406 U. S. (1972).

The Delaware Supreme Court has held that the common, ordinary dictionary meaning of the statutory phrase "not fitted" should be used in applying the TPR statute. "[A]s to matters pertaining to custody of children [the words 'not fitted'] are to be read generally as meaning 'unfitted for parental duties'." *In re Dingee,* 328 A. 2d 139, 140 (Del. 1974). Furthermore, the Delaware Supreme Court twice has cited with approval the following standards adopted in *Clarke v. Lyon,* 82 Neb. 625, 633, 118 N. W. 472, 475 (1908): a) concern the parent has shown in the past for the children; b) the suitability of the parents' domestic surroundings to receive the children; and c) the children's general welfare. *In re Dingee, supra; In the Matter of Three Minor Children,* 406 A. 2d 14, 17 (Del. 1979). Additionally, the Delaware Supreme Court held below that:

> Unfitness cannot be based on poverty and lifestyle which do not reflect a lack of concern for and ability to care for the children or an unwillingness to receive the children as part of a family. *In the Matter of Five Minor Children,* 407 A. 2d 198, 200 (Del. 1979).

The difficulty in drawing an absolute statute which could cover all examples of parental unfitness, a problem highlighted by the Delaware Supreme Court in *Dingee* and *Five Minor Children,* is patent when one looks to

the statutes to which appellants point as examples;[49] to their own admission that there is "no slide-rule calculation" for determining unconstitutional vagueness;[50] to an *amicus'* recognition of the flexibility and reasonable breadth which must be permitted to exist in the child welfare context[51] and to the generality of the "standards" urged on this Court by another *amici*.[52] All reinforce the wisdom and the constitutional acceptability of the former Delaware TPR statute.

That the new statute, 13 *Del. C.* § 1103(5) set out in Appendix B, serves to address some of the principal objections of the parents and *amici* here does not damn the former statute. Standing on its own, former 13 *Del. C.* § 1103(4) under which the parental rights of Doe and Roe were terminated almost five full years ago satisfied Due Process standards. The future of these children

49. Appellants contend e.g. that the Michigan legislature has successfully managed to give explicit guidance to parents in its child custody statute. Mich. Comp. Laws Ann. § 722.23 (Supp. 1976). A close examination of the Michigan scheme, however, demonstrates its necessary lack of specificity. If Doe and Roe concede the appropriateness and acceptability of the Michigan law (a custody statute), they cannot attack the Delaware TPR statute. The Michigan law is replete with terms which necessarily require judicial explication. The terms "other emotional ties", "satisfactory environment", "moral fitness", and "mental health" which are in that statute are clearly not explicit. The final factor to be considered by the Michigan domestic courts, i.e. "any other factor considered by the court to be relevant," is an emphatic endorsement of the holding of the Supreme Court of Delaware in this case.

50. Brief for Appellants p. 24.

51. Brief for the Legal Aid Society of the City of New York, Juvenile Rights Division, as Amicus Curiae p. 25.

52. *See* Argument III in Brief of American Orthopsychiatric Assn., et al., as Amicus Curiae.

wedded as inexorably as it is to their past should not be disregarded unless there is no doubt in this Court's opinion that the former TPR statute was vague and the best interests of these five children can be vindicated by such a declaration.

Nor is the "best interest" standard impermissibly imprecise. In fact, the Delaware Supreme Court has suggested that the relevant factors in a custody proceeding provide a good basis for assessing the "best interest" of a child in a TPR setting. *In the Matter of Three Minor Children,* 406 A. 2d at 19. These relevant factors include: the interaction and interrelation of the child with his parents, his siblings and others who may significantly affect his interests; the child's adjustment to his home, school, and community; and, the mental and physical health of the individuals involved. *See* 13 *Del. C.* § 722 (a). The application of those factors here confirms the result of the trial court.

Similarly flexible statutes couched in commonly understood language have been upheld in other jurisdictions. In *Matter of Keyes,* 574 P. 2d 1026 (Okla. 1978), the Supreme Court of Oklahoma upheld a statute which permitted termination if a parent:

> [F]ailed to give the child parental care or protection necessary for his physical or mental health. 10 O. S. 1971, § 1130A. (3)(a).

The Court was "not persuaded by the *Alsager* case . . . nor the reasoning of *Roe v. Conn.* . . ." *Id.* at 1029. Similarly, the Texas Court of Civil Appeals in *Sanchez v. Texas Department of Human Resources,* 581 S. W. 2d 260 (Tex. 1979) specifically refused to follow *Alsager* in reviewing a TPR appeal.

Other state courts have rejected vagueness attacks on statutes because their respective TPR laws provide basic

standards which the "average intelligent person can understand" [53] or which can be "commonly grasped." [54] Some state courts which rejected vagueness challenges prior to *Alsager* were not swayed by the same rationale.[55]

The almost universal refusal to follow *Alsager* is recognition that:

> . . . [U]nlike criminal statutes in which the interests of only one set of individuals is involved, the constitutional issue must be examined with the interests of both the child and the parents. What might be unconstitutional if only the parents' rights were involved is constitutional if the statute adopts legitimate and necessary means to protect the child's interests. *State v. McMaster,* 259 Ore. 291, —, 486 P. 2d 567, 569 (1971).

The cases upon which the parents rely simply do not stand the tests of constitutional requirement, logic, or practicality. The Division agrees with the Court in *Alsager v. District Court of Polk County, Iowa,* 406 F. Supp. 10 (S. D. Iowa 1975) [56] that "Citizens should be able to guide their conduct by the literal meaning of phrases expressed on the face of statutes." at 18. Beyond that correct statement, which was followed in Delaware in this very case, the *Alsager* court required a higher standard in application. There are no "multifarious mean-

53. Matter of D. T., 89 S. D. 590, 596, 237 N. W. 2d 166, 169 (1975); In re William L., 477 Pa. 322, 383 A. 2d 1228, cert. denied 439 U. S. 880 (1978).

54. In re Metteer, 203 Neb. 515, 279 N. W. 2d 374 (1979).

55. E.g., In re Cager, 251 Md. 473, 248 A. 2d 384 (1968); State v. McMaster, 259 Ore. 291, 486 P. 2d 567 (1971).

56. Roe v. Conn., 417 F. Supp. 769 (M. D. Ala. 1976) adds nothing substantive to the Alsager discussion.

ings" (*Id.*) with which the parent must contend in the former Delaware statute. If the phrase "unfit to exercise parental duties" is complex or not easily comprehended by persons of average intelligence it is not because the terms are standardless. If one is unable or unwilling to provide for the care, nurtuance, medical and emotional needs of one's children no reasonable man would argue that the parent should retain custody and control of his child to that child's detriment. If, as in this case, the pattern of failure to plan and provide for the children is repeated over time with several children, the parents should not be able to hold some tenuous thread of control over the future direction of the children's lives. These children deserve some final and permanent "family" within which to grow and prosper as whole human beings and full citizens of our State and Nation.

As noted above, the Delaware Supreme Court had interpreted the former TPR statute in such fashion, that even if it had been facially defective, it was clarified to the extent that reasonable guidelines were articulated for its application. The Delaware Supreme Court took great pains to make it clear that neither poverty nor unconventionality were themselves grounds for termination thus further restricting any subjectivity which a trial court might otherwise thoughtlessly exercise.

Contrary to the parents' assertions, application of the *Alsager* standards will not protect family integrity as this case so clearly shows. Doe and Roe exhibited little interest in their children while they were in their custody and even less after the children were placed by the Division. At one point prior to the institution of any termination proceedings Doe and Roe simply disappeared for four months. Since the termination proceedings were instituted, they have shown only a fleeting interest in the children. There have been no contacts initiated by the parents

in years. The children have not seen their biological parents for five years (the youngest are under six years of age). At oral argument before the Delaware Supreme Court in 1978 the parents' counsel did not know where they were. What would have happened to the five children had the Delaware Supreme Court found in their parents favor? To whom would they have been returned? Now all the parents ask is to have "contact" with the children. What does that mean for these parents and these children? We submit it does not mean that the parents have any affirmative desire to reestablish the family unit. Doe lives in Georgia. Roe is married and is raising her husband's child. What will happen to the bonds of familial affection which the parents and *amici* tout in their briefs? Nothing; as a practical matter nothing will happen and these five children may be wrenched from families with whom they have spent considerable time and with whom they may spend the rest of their lives in reality experiencing the bonds of familial affection, albeit not in a biological family and placed in some form of long term foster care.

II. Children Do Not Have an Independent Constitutional Right to Representation in Termination of Parental Rights and Proceedings.

The various *amici curiae* have raised an argument not raised before in prior proceedings in this action, that the children here should be accorded separate representation either through the appointment of an attorney or a *guardian ad litem*.[57]

While the Division is not philosophically opposed to independent representation of children in TPR proceedings

57. Brief of the Legal Aid Society of the City of New York, Juvenile Rights Division, argument 1; Brief of National Association of Counsel for Children et al., argument 1; Brief of American Civil Liberties Union, argument II.

it is fair to say that, despite the activity of *amicus* Juvenile Rights Division of the Legal Aid Society of New York, the concept is of relatively recent origin on the national level and certainly was not in practice on any national scale while this case was being litigated in the trial court in 1975 and 1976. Today, in keeping with its policy, the Division itself would petition for the appointment of a *guardian ad litem* to represent the interests of the children in any TPR proceeding in which abuse or neglect was an issue. Should this case be remanded the Division would not oppose the appointment of a *guardian ad litem* to represent the interests of the children. However, the Division does not accept *amici's* argument that such an appointment is or was constitutionally mandated nor that it would be helpful to the children or this Court at this stage of the proceedings.

Each of these children has been in the custody of the Division since a very early age. None has seen his parents for over five years. The termination proceedings were commenced in 1975 and completed the following year. It was at that time that a *guardian ad litem* could have functioned effectively for these children. To now hold that those hearings were constitutionally deficient because of the absence of a *guardian ad litem* would as surely upset the present delicate balance of these children's lives as would voiding the proceeding because the statute under which the termination was effected was not as precise as the parents would desire.

The *amici* would have this Court mandate the appointment of an independent counsel/*guardian ad litem* not from any clearly articulated constitutional requirement but because they oppose and castigate the operation of foster care alternatives.

However, unknown to or undiscovered by *amici* are the salutory provisions of the Foster Child Review Act, 31

Del. C. c. 38 (repeated at Appendix C of this Brief). Rather than condemn children in foster care to an indeterminate limbo, the Foster Child Review Act provides for regular review of foster care placements by a panel of persons unconnected with the Division or placement agencies. The Foster Child Review Board may initiate an action in Family Court to enforce its placement recommendations. Such recommendations may include returning a child to his parents, initiating TPR proceedings, or providing for long term foster care plans if no other alternative appears to be in the best interests of the child. In light of this extensive independent review procedure and the absence of any evidence on the record to suggest the Delaware simply kidnapped these children or others the sociological arguments advanced by the *amici* must be disregarded insofar as Delaware and this case are involved.

Nor are there any reasons articulated in this Court's decisions which would compel the appointment of a counsel/guardian for the child. In *In re Gault*, 387 U. S. 1 (1967) the significance of the rule calling for the appointment of counsel lay in the penal nature of the "civil" action. In *Gault* the proceeding was directed against the child and but for his tender years the complaint would have been tried in the State's criminal courts. This is not the case here. There are no criminal or quasi-criminal charges pending against the children, rather the State is taking an action which is a condition precedent to placement of the children in normal, stable, nurturing family homes. That the State may act *parens patriae* in the interests of its children was recognized by this Court as recently as *Parhem v. J. R.*, 442 U. S. 584 (1979). In that case, the State was permitted to "voluntarily" commit its wards to mental institutions for medical treatment so long as the commitment was reviewed by a non-law

trained independent fact-finder who had the authority to refuse the admission. Here the child's procedural protections are even greater. Prior to the termination an evidentiary hearing must be had before a judge who may deny the Division's application or stay it pending further factual developments as in the companion case of *Able and Able v. The State of Delaware,* No. 79-6370, Jurisdictional Statement filed May, 1980. There has been no showing of bad faith on the State's part by the parents. The record amply discloses the State's continuous efforts to assist the parents before the TPR proceedings were instituted. Given that the record does not disclose any evidence showing that the State was acting for reasons unrelated to the children's need for permanent familial attention, and given that the Delaware statutory scheme requires that the trial court consider the best interest of the children, there is no basis to challenge that the State acted in the best interest of the children here and no constitutional basis to assert that independent counsel is required.

III. Extraordinary Standards of Proof Are Not Required in TPR Proceedings Because of the Competing Interests of the Children.

The children have the same or a greater stake in the outcome of TPR proceedings than their parents. Consequently, application of the standard of proof sought by the appellants in the state courts—beyond a reasonable doubt—would constitute a denial of due process to the children. Indeed any standard other than a preponderance of the evidence would violate the children's rights.[58]

58. The standard of proof in most civil proceedings in Delaware is a preponderance of the evidence. Warwick v. Addicks, 157 A. 205 (Del. Super. 1931). In fact the IAJ/ABA Juvenile Justice Standards Project Standards Relating to Abuse and Neglect, 1977 Tentative Draft cited by the parents and *Amici* National

The requirements of the Due Process Clause in TPR proceedings, like any other application, are not rigid and inflexible. The appellee, of course, agrees that the freedom to maintain a natural family is a liberty interest protected by the Due Process Clause. *See, e.g., Cleveland Board of Education v. LaFluer,* 414 U. S. 632, 639-40 (1974); *Meyer v. Nebraska,* 262 U. S. 390 (1923). However, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U. S. 471, 481 (1972). The specific dictates of the Due Process Clause in any given situation involve consideration of certain distinct factors, including the private interests which will be affected. *Matthews v. Eldridge,* 424 U. S. 319, 335 (1976). The nature of the competing interests governs the standard of proof applied. One of the private interests involved here—that of the children—requires that any standard of proof other than a preponderance of the evidence be avoided.

The standard of proof is used to allocate the risk of error between the litigants. *Addington v. Texas,* 441 U. S. 418 (1979). In classes of cases where an erroneous verdict generally has no more serious consequences for either party, the preponderance of evidence is applied as the standard of proof. *In re Winship,* 397 U. S. 358, 371 (1970) (Harlan, J., concurring). Thus, unless one class of litigants will be more substantially injured by an erroneous decision than the competing class of litigants, the preponderance of evidence is the appropriate standard to apply. The standard of proof in TPR proceedings, therefore, turns on the relative weight of the interests of the parties.

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58. (Cont'd.)
Assn. of Counsel for Children et al., and American Civil Liberties Union would apply the "clear and convincing" test only *against* the parent when he was put to the task of rebutting a showing that parental rights should be terminated. *See* Standard 8.3.

The interests of the children require that the preponderance of evidence standard be applied in TPR proceedings. Although the state is the nominal party in such proceedings, it represents the interests of the children. *See Stanley v. Illinois,* 405 U. S. 645 (1972).[59] The state has a transcendent interest in protecting the welfare of its minor children. *Ginsberg v. New York,* 390 U. S. 629, 641 (1968). It is these interests which entail the right to a stable life free from physical and emotional abuse and neglect—which are at least equal to (if not paramount to) the interests of the parent.[60] J. Goldstein, A. Freud & A. Solnit, *Beyond the Best Interests of the Child,* 105-111 (1973). Indeed the *Alsager* court explicitly noted that it was not concerned with the child's rights vis-a-vis the parents. *Alsager v. District Court,* 406 F. Supp. 10, 16 fn. 3 (S. D. Iowa 1975).

There is no rational basis to conclude that the interests of the parents are so superior to those of the children so as to require an extraordinary standard of proof before their extinction. Whatever due process safeguards attach to these parental interests, they become attenuated when those interests are opposed by the interests of the children. *See Smith v. Organization of Foster Families,* 431 U. S. 816 (1977). Necessarily this is always the case in contested TPR proceedings. A weighing of the relative

59. At no time have the appellants contested the right of the state to terminate parental rights in appropriate cases. Although appellants may contest the conclusion drawn by the Delaware courts in this case, they do not contest the authority of the state to seek to protect the children's interests.

60. Certainly the interests of abused and neglected children are adverse to those of the parents who desire to maintain the already fractured familial relationship. *See* Smith v. Organization of Foster Families, 431 U. S. 816, 857 n. 1 (1977) (Stewart, J., concurring) (foster children may have interests adverse to foster parents in decision to relocate foster children).

importance of the parental interests vis-a-vis the interests of the children is properly a legislative function. Thus state statutory schemes requiring or permitting TPR applications to be decided on the basis of the preponderance of the evidence represent a legislative determination that the interests of the parents are not paramount to those of the children. *In re Hernandez,* 53 Ariz. App. 32, 530 P. 2d 389 (1975); *Matter of N. J. W.,* 273 N. W. 2d 134, 139-140 (So. Dak. 1978).[61]

Appellants virtually ignore the interests of the children. The only "interest" which they articulate is that the child has a "common interest" in remaining with his parents. They cite *Woodby v. Immigration and Naturalization Service,* 385 U. S. 276 (1966) involving extraordinary standard of proof. The case, however, has little or no relationship to the instant matter. It involves the balancing of the interests of an individual litigant against those of society as a whole. But in TPR proceedings the interests to be balanced are not diffused among the general public; they are the interests of the children who have a direct and immediate stake in the outcome of the proceeding.

Despite the parents' attempt to dismiss it in a footnote, (Brief for Appellants p. 27 fn. 47) this Court has recently approved of the preponderance rule in loss of citizenship cases. *Vance v. Terrazas,* 48 U. S. L. W. 4069 (Jan. 15, 1980). As the regulation of the parent-child relationship is a matter of State rather than federal legislative concern, the failure of the Delaware General Assembly

61. The legislative branch is free to make such policy decisions. In Woodby v. Immigration and Naturalization Service, 385 U. S. 276 (1966), the Court applied a clear and convincing standard of proof only after determining that "Congress has not addressed itself to the question of what degree of proof is required in deportation proceedings." 385 U. S. at 284.

to require a greater standard than a preponderance of the evidence should be given great weight here, as it was by the Delaware Supreme Court.

Even if the parents' failure really to consider the interests of the children is overlooked, their argument is still unpersuasive. Appellants place primary emphasis on *Addington v. Texas,* 441 U. S. 418 (1979) to support their claim that the state must prove the children's case beyond a reasonable doubt in TPR proceedings.[62] *Addington* refused to apply that standard for several reasons which are applicable here.

First, the *Addington* Court noted that in a civil commitment state power is not exercised in a punitive sense. Likewise, TPR proceedings are not conducted to punish the parent; rather they are expressly intended to protect the interests of the child.

Second, the Court also found that the inquiry in a commitment proceeding is very different from that in a criminal proceeding. In criminal cases the standard is straight-forward: did the accused commit the crime alleged. But the Court noted that in civil commitment pro-

62. Throughout the course of the state court proceedings, appellants consistently argued that "beyond a reasonable doubt" was the appropriate standard; they never argued that a lesser extraordinary standard of proof, such as "clear and convincing", was appropriate. The substance of appellant's arguments are reflected in the Delaware Supreme Court's opinion, which considered only the beyond a reasonable doubt standard. Quite properly, the Delaware courts never considered the clear and convincing standard since appellants never argued in favor of its adoption.

Appellants did not expressly urge the adoption of the clear and convincing standard in their Jurisdictional Statement. They just articulate it here and it should be rejected since it has never been fairly presented to the state courts.

Appellee hastens to emphasize, however, that the interests of the children require rejection of any extraordinary standard of proof.

ceedings, the inquiry is not so clear. Given the lack of certainty and the fallibility of psychiatric diagnosis, the Court concluded that it was doubtful a state could ever prove its case beyond a reasonable doubt. Similarly, given the necessity for subjective evaluations in TPR proceedings it would be impossible for a state to prove the children's case beyond a doubt. Thus, the sought-after standard would completely frustrate any statutory scheme permitting termination of parental rights.

IV. The Termination Proceedings Do Not Constitute a Denial of Substantive Due Process.

Appellants now contend[63] that substantive due process requires that the state establish a compelling state interest before terminating their parental rights. This argument misapprehends the due process clause; the state need only establish that termination is reasonably related to a legitimate state purpose. Moreover, the evidence in this case clearly establishes a compelling state interest in the termination of the parent's rights.

Previous decisions of this Court indicate that the compelling state interest test is not applicable here. Rather the test is whether the termination is reasonably related to a legitimate state purpose. In *Pierce v. Society of Sisters,* 268 U. S. 510 (1925) the Court considered the validity of a state statute requiring children to attend

63. During the course of the proceedings in the state courts, appellants did not make any substantive due process argument. The substantive due process arguments now presented to this Court were not timely made to the Delaware Supreme Court. Appellants did not even mention substantive due process until after the Delaware Supreme Court had issued its opinion when they filed their motion for reargument. The Appellant's brief accompanying that motion includes 1 and ½ pages of argument pertaining to substantive due process. Since it was presented for the first time on a motion for reargument it was not fairly raised in the state courts.

public schools.[64] The statute was challenged, *inter alia,* on the ground that it interferred with the family relationship. The Court responded by applying the reasonable relationship test. It wrote:

> Under the doctrine of *Meyer v. Nebraska,* 262 U. S. 390, 43 Sup. Ct. Rep. 625, 67 L. Ed. 1042, 29 A. L. R. 1146, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, *rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state.* (268 U. S. at 534-5) (emphasis added).

The significance of *Pierce* was underscored in *Wisconsin v. Yoder,* 406 U. S. 205 (1972) wherein the Court sustained a free exercise challenge by Amish parents who refused to send their children to public or private school. In arriving at its conclusion, the Court recognized that ordinarily a reasonable relationship to some legitimate state purpose is required for a state to interfere with a familial relationship. However, the Court distinguished the case then before it solely on the basis that it also included a First Amendment claim.[65] No such claim is

64. Pierce has been characterized as "perhaps the most significant (statement) of the Court in this area. . . ." Wisconsin v. Yoder, 406 U. S. 205, 232 (1972).

65. The Yoder Court wrote in pertinent part:

> [W]hen the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a "reasonable relation to some purpose within the competency of the State" is required to sustain the validity of the State's requirement under the First Amendment. (406 U. S. at 233).

presented here. It is therefore clear from *Yoder* that the reasonable relation test is applicable here.

It is beyond question that the welfare of children is a legitimate concern of the state. *See, e.g., Ginsberg v. New York,* 390 U. S. 629 (1968). This Court has recognized that the severance of a familial relationship may be necessary to preserve the welfare of a child. *Stanley v. Illinois,* 405 U. S. 645 (1972) (dictum). *Smith v. Organization of Foster Families,* 431 U. S. 816 (1977) (dictum). Thus termination proceedings are reasonably related to a legitimate state purpose.

The question thus is whether the termination in the instant case bears a reasonable relationship to the welfare of the children. The record manifests such a relationship. Appellants' contention that no harm was done to these children is false. The record of the five-day proceedings in this case indicates that the parents had shown themselves to be incapable of providing these children with any sort of stable, nurturing environment. These parents made nineteen changes of residence between eleven different localities within a two-year period. Many of these residences were with other families in grossly over-crowded housing arrangements. The father was shown to have sexually toyed with his four-year-old daughter, resulting in a conviction for offensive touching. The two eldest children were in a voluntary foster placement for an extended period of time prior to the birth of the third child. The parents were engaged in an ongoing incestuous relationship throughout the case.

It can clearly be seen from these facts and the rest of the record that the mental, emotional and physical health of these children would have been placed in serious jeopardy had their parents' rights not been terminated. The State took repeated action to attempt to improve the children's living conditions prior to termination. Fi-

nally, termination proceedings were instituted to ensure these children the greatest possibilities for maximum continuity of personal relationships, surroundings and environmental influences. Had it not terminated these rights, the children would most probably have been placed in prolonged foster care, while their parents attempted to resolve their problems which they had made no inroads against during the three years prior to the TPR. The detriment to children caused by the continued impermanence and uncertainty in their placement seems obvious. J. Goldstein, A. Freud & A. Solnit, *Beyond The Best Interests of the Child* (1973).

The showing in the state courts and the principles applied by those courts comport with the substantive requirements of due process. In *Smith v. Organization of Foster Families,* 431 U. S. 816 (1977), Mr. Justice Stewart espoused the following view in a concurring opinion:

> If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on 'the private realm of family life which the state cannot enter.'

(431 U. S. at 862-3) (Stewart, J., concurring). This view was later adopted by the full court in *Quilloin v. Walcott,* 434 U. S. 246, 255 (1978) (dictum). In the instant case the state courts have required and found a showing of unfitness of the parents. This showing establishes a reasonable relationship between the termination and a legitimate state purpose. Thus, the requirements of the Due Process Clause are satisfied.

CONCLUSION

For the reasons stated herein the judgment of the Supreme Court of Delaware should be affirmed; or the order noting probable jurisdiction should be vacated and the appeal dismissed or affirmed.

If, however, the Court reverses the judgment of the Supreme Court of Delaware, such action should have prospective effect only.

Respectfully submitted,

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APPENDIX A

13 *Del. Code* § 1103(4) REPEALED

The procedure for termination of parental rights for the purpose of adoption or, if a suitable adoption plan cannot be effected, for the purpose of providing for the care of the child by some other plan which may or may not contemplate the continued possibility of eventual adoption, may be initiated whenever it appears that:

. . .

(4) The parent or parents of any such child, or person or persons or organization holding parental rights over such child are not fitted to continue to exercise parental rights. . . .

APPENDIX B

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13 *Del. Code* § 1103(5)

The procedure for termination of parental rights for the purpose of adoption or, if a suitable adoption plan cannot be effected, for the purpose of providing for the care of the child by some other plan which may or may not contemplate the continued possibility of eventual adoption, may be initiated whenever it appears that:

. . .

(5) The parent or parents of any child, or any person holding parental rights over such child are not able, or have failed, to plan adequately for the child's physical needs or his mental and emotional health and development and:

a. In the case of a child in the care of an authorized agency:

1. The child has been in the care of an authorized agency for one year, or there is a history of previous placement or placements of this child, or a history of neglect, abuse, or lack of care of other children by this parent, and

2. The conditions which led to the child's placement still persist, and there appears to be little likelihood that those conditions will be remedied at an early date so that the child can be returned to the parent in the near future.

b. In the case of a child in the home of a stepparent or blood relative:

1. The child has resided in the home of the stepparent or blood relative for a period of at least one year, and

2. The Court finds the non-custodial parent or parents incapable of exercising parental responsibilities, and that there appears to be little likelihood such parent or parents will be able to exercise such parental responsibilities in the foreseeable future."

APPENDIX C

31 *Del. Code* c. 38 (1979 Interim Supp.)

§ 3801. Purpose.

It is determined that an independent monitoring system to identify and periodically review children in foster care in the State is in the best interests of the health and welfare of all citizens of Delaware. It is the purpose of this chapter to provide such a system in order to insure continuing efforts to obtain permanent homes for children; to acknowledge that the time perception of children differs from that of adults; to provide stability in the lives of children who must be removed from their homes; and to make the ongoing needs of a child for proper physical, mental, and emotional growth and development the decisive considerations in permanency planning.

§ 3802. Definitions.

(a) "Placement agency" shall mean the Division of Social Services and any agency, organization or institution engaged in the placement of children in foster care in this State.

(b) "Child" shall mean any child who has been placed in the custody or care of the Division of Social Services or any other placement agency by court order, or placed voluntarily in a private placement agency for more than 1 year.

§ 3803. Foster Child Review Board—Established; composition; terms; appointment; removal; vacancies.

(a) There is hereby established a Delaware Foster Child Review Board. For administrative purposes, the Board shall be within the Administrative Office of the Courts.

(b) The Board shall consist of 21 members, of whom 1 shall be the Chairman. No more than 11 Board members shall be registered members of the same major political party. When appointed, a Board member shall be a citizen of the United States and a resident of this State for at least 1 year immediately preceding the appointment. Four members shall reside in the City of Wilmington, 4 members shall reside in the remainder of New Castle County, 4 members shall reside in Kent County, 4 members shall reside in Sussex County and 5 members shall reside anywhere within this State.

(c) Seven of the original members of the Board shall be appointed to 3-year terms, 7 of the original members of the Board shall be appointed to 2-year terms and 6 of the original members of the Board shall be appointed to 1-year terms. At the expiration of the terms of the original members of the Board, all appointments shall be for 3 years. A member shall continue to serve until his successor is appointed by the Governor.

(d) The Governor shall appoint the Chairman and members of the Board. The Chairman will serve at the Governor's pleasure. The Governor shall appoint replacements for the unexpired term only.

§ 3804. Same—Meetings.

The Board as a whole shall meet at least 2 times per year and shall annually elect such officers as are necessary from among its members.

§ 3805. Same—Compensation and expenses for members.

Each member of the Board shall receive, upon request, reimbursement for necessary expenses to

attend meetings. Such expenses may not exceed the mileage rate paid to state employees, per mile actually travelled, or the cost of public transportation and no more than $10 per meeting for other miscellaneous expenses.

§ 3806. Same—Qualifications of members.

(a) Board members shall be citizens who have demonstrated an interest in children and their welfare through community service or professional experience, or possess a background in law, sociology, psychology, psychiatry, education, theology, social work, medicine or related fields.

(b) No person employed by the Division of Social Services, any placement agency or Family Court of the State may be appointed to the Board.

(c) There shall be no discrimination in appointment of Board members on the basis of sex, socio-economic, racial or ethnic factors.

§ 3807. Same—Powers.

The Board shall have the power and authority to:

(1) Adopt rules and regulations consistent with the purpose and provisions of this chapter and with applicable federal and state laws, subject to the Administrative Procedures Act, Chapter 64 of Title 29.

(2) Designate an Executive Committee which may act between meetings of the Board, subject to confirmation of its decisions by a quorum of the Board, which Executive Committee shall consist of not less than 5 members of the Board and shall be chaired by the Chairman of the Board.

(3) Employ, supervise and evaluate an Administrative Coordinator, who shall serve as chief administrator, to properly implement and administer this chapter, subject to budget restraints.

(4) Advise the Administrative Coordinator on the establishment of training, with periodic in-service training, of the Board.

(5) Monitor and evaluate the effectiveness of the implementation of this chapter.

(6) Review and analyze reports on the status of all children in foster care, which reports shall be provided at least quarterly by the placement agencies. The first reports shall be provided within 180 days of July 13, 1979. Such reports are to include information concerning the number of children entering and leaving foster care during each quarter.

(7) Provide advice to placement agencies concerning the kind of information which should be maintained and provided by said agencies to assist in the review and monitoring of the foster care system.

(8) Consult with placement agencies and other entities as appropriate in arriving at policies and procedures in order that the maximum amount of coordination and cooperation may be achieved between the Boards and organizations which are involved in foster child care.

(9) Approve the Administrative Coordinator's annual budget request and other applications for funds from any sources.

(10) Make recommendations to the Governor, the Chief Justice of the Supreme Court of the State and the General Assembly, concerning resources, policies, procedures and statutes which affect the goal of permanency for children.

(11) Make a written annual report on the effectiveness of this chapter to the Governor, the Chief Justice of the Supreme Court of the State and the General Assembly, which shall be available to the general public upon request.

§ 3808. Same—General responsibilities for case review.

(a) The Board is hereby authorized to select annually a representative sample of the foster care caseloads of placement agencies for individual review, subject to the following:

(1) A maximum of 400 reviews per year may be conducted.

(2) The number of reviews from each placement agency's caseload is to be proportionate to that agency's percentage of the total.

(3) The Board may review an individual child's case twice yearly.

(4) The Board shall begin reviewing cases effective July 1, 1980.

(b) The Board is authorized to divide itself into committees of not less than 5 members for the purpose of reviewing the cases of individual children in foster care.

(c) The purposes of case review are as follows:

(1) To submit review reports with findings and recommendations to the placement agency and participating parties.

(2) To encourage and facilitate movement toward the return of a child to his or her parents or guardian or initiation of termination of parental rights proceedings.

(3) To encourage stable, long-term foster care in the event that return to the parents or guardian or termination of parental rights is not possible, feasible or in the best interest of the child.

(4) To encourage and facilitate stability in foster care by urging fewer changes in placement per child and by urging good foster parent recruitment procedures.

(5) To assist placement agencies with dissemination of information about the rights and responsibilities of biological parents, foster parents and other interested parties in regard to a child in foster care.

(6) To make recommendations to the Board regarding foster care policies and procedures.

§ 3809. Same—Review procedures.

(a) The review procedures for the Board shall include consideration and evaluation of such matters as:

(1) The goal of the permanent placement plan.

(2) Services to the child and others involved.

(3) Placement of siblings.

(4) Length of time spent in foster care.

(5) Number of placements.

(6) Whether the child's wishes were considered, where appropriate.

(7) Efforts made to fulfill the permanent placement plan by all involved.

(8) The opportunity to have and participate in regular visits with the child by the biological parents or legal guardian.

(9) Whether there are obstacles which hinder or prevent attainment of the placement goal.

(b) Any Board member who has personal knowledge of, or is acquainted with, any of the principals in a case shall disqualify himself or herself from reviewing that case.

(c) Meetings at which individual cases are discussed or reviewed shall not be subject to § 10004 of Title 29.

(d) Records of the Board which pertain to individual cases and review thereof shall be exempt from Chapter 100 of Title 29.

§ 3810. Notice of review.

The Board shall send out written notices of a schedules review at least 30 days in advance to the following, who may appear at the review session:

(1) The placement agency;

(2) The child, where appropriate;

(3) Parents or legal guardian;

(4) Foster parents;

(5) Child's attorney, if applicable; and

(6) Any person or agency interested in or having knowledge or information about the child.

§ 3811. Records of review.

(a) At least 7 days before each child's review, the placement agency shall submit to the Administrative

coordinator the child's permanent placement plan and a written report on the progress towards implementation of such plan.

(b) Subject to legal requirements, placement agencies are obligated to provide the Board with information needed for review, in addition to the information supplied in subsection (a) of this section. The Board may petition the Family Court for a hearing if it is refused records which it believes it should have under this section.

§ 3812. Confidentiality of records.

(a) All records and information in the possession of the Division of Social Services, any placement agency or the Board, regarding children and their parents or relatives, shall be deemed confidential, and shall be disclosed only pursuant to this chapter.

(b) Violation of this section is a class C misdemeanor. The Superior Court shall have jurisdiction over violations of this section.

(c) Any member of the Board or the administrative staff of the Board who violates these provisions and improperly discloses confidential information shall immediately be removed or dismissed.

§ 3813. Recommendations.

The Board shall submit a written report of the review, within fifteen days, to the placement agency and other participating parties. This report shall offer findings and recommendations such as:

(1) Return of the child to his or her parents or guardians.

(2) Adoption of the child.

(3) Initiation of termination of parental rights proceedings.

(4) Continued foster care placement is best and permanent placement plan is appropriate.

(5) Continued foster care placement is best, but permanent placement plan is not appropriate.

§ 3814. Petition for judicial hearing.

(a) Upon receipt of the review report required by § 3813 of this title, the placement agency shall inform the Board within 10 days of any disagreement with the Board's recommendations, in which case the Board or other participating parties may petition the Family Court within 15 days for a judicial hearing. If the agency fails to advise the Board of such disagreement, it shall be presumed that the agency agrees with the recommendations of the Board and will act accordingly.

(b) The Board may petition the Family Court for a judicial hearing if there has been no documented action toward achievement of a permanency plan during a 1-year period.

§ 3815. Notice of hearing.

A judicial hearing by the Family Court of the State shall be held upon petition by the Board or participating party, within 45 days after filing date of such petition. The Court shall send written notification of such hearing at least 15 days in advance to:

(1) The placement agency;

(2) The Administrative Coordinator;

(3) The child, where appropriate;

(4) The parents or legal guardian;

(5) The foster parents;

(6) The child's attorney, where applicable; and

(7) Other interested or involved persons.

§ 3816. Court orders.

After a judicial hearing, the Family Court of the State may enter an order:

(1) Directing the return of the child to his or her parents or guardian;

(2) Continuing placement under the current permanent placement plan;

(3) Continuing placement under a revised permanent placement plan; or

(4) Appointing an attorney to represent the child and recommend that the child's attorney initiate termination of parental rights proceedings on behalf of the child in the appropriate court of competent jurisdiction.

§ 3817. Permanent placement plan.

(a) The placement agency holding custody shall prepare, with consultation and information from the child's parents or guardian, the child's attorney if applicable and where appropriate the child, a permanent placement plan for the child. Where no placement agency holds custody, the placement agency having care of the child shall prepare the permanent placement plan.

(b) The permanent placement plan for each child shall include:

(1) The purpose for which the child was placed.

(2) The goal for permanent placement.

(3) The length of time in foster care needed to achieve the goal.

(4) A statement of duties of the placement agency, parents, legal guardian and foster parents and services to be provided by the placement agency and other service providers.

(5) The person in the placement agency directly responsible for the implementation of the permanent placement plan.

§ 3818. Administrative Coordinator.

Under the direction of the Board, the Administrative Coordinator's duties shall include, but not be limited to:

(1) Application for and administration of funds for the foster child review system.

(2) Hiring and supervising of system employees and maintaining all necessary records and files.

(3) Implementing policies and procedures of the Board and representing the Board's policies in contacts with various other agencies and organizations.

(4) Collecting necessary data and statistics in order that the Board may monitor and evaluate the effectiveness of implementation of this chapter.

(5) Supervising the day-to-day operations of the Board.

(6) Providing training programs for the Board.

(7) Conduct research and develop advocacy programs designed to improve the lives of children in foster care.

(8) Consulting the placement agencies and other appropriate parties to assure the maximum coordination and cooperation between everyone involved in foster care.

§ 3819. Timetable.

All appointments of Board members shall be made within 90 days of July 13, 1979, and the Administrative Coordinator shall be selected within 180 days of July 13, 1979.

§ 3820. Construction of chapter.

This chapter, being necessary for the welfare of the State and its inhabitants, shall be liberally construed to effect the purposes thereof.

§ 3821. Evaluation of foster care review system.

No later than 3 years after July 13, 1979, the Board, in consultation with the Department of Health and Social Services, shall retain a qualified consultant to perform an independent evaluation of the state's foster care review program, who shall, by December 1, 1982, make recommendation to the Governor and the General Assembly as to the continuation or termination of the foster care review program and the proper scope of the program, including the expansion or reduction of the number of individual case reviews.

§ 3822. Conflict with existing laws.

Any provisions of this chapter which shall cause the State to lose federal funding shall be considered null and void.

SUPREME COURT, U.S.
FILED
SEP 10 1980
MICHAEL RODAK, JR., CLERK

No. 79-5932

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

JOHN DOE AND JANE ROE,

Appellants,

v.

STATE OF DELAWARE,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF DELAWARE

REPLY BRIEF FOR APPELLANTS JOHN DOE AND JANE ROE

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REPLY BRIEF FOR APPELLANTS JOHN DOE AND JANE ROE

This reply brief first addresses issues, relating to the merits of the case, presented by the State's answering brief ("State Br."). It then addresses other issues raised by the State or the amici.[1]

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[1]Amici briefs have been submitted by the American Civil Liberties Union ("ACLU Br."); the American Orthopsychiatric Association, *et al.* ("AOA Br."); the New York Legal Aid Society ("Legal Aid Br."); and the National Association of Counsel for Children, *et al.* ("NACC Br."). So far as they address the constitutional issues presented in appellants' opening brief, all amici appear to support the appellants' position.

I.

TERMINATION OF THE DOES' PARENTAL RIGHTS IS UNCONSTITUTIONAL FOR EACH OF THE THREE SEPARATE REASONS STATED IN THE OPENING BRIEF.

A. The State's Brief Has Misstated Significant Facts.

The State's "statement of the case" reflects a colorful but inaccurate version of the facts. Several of the State's factual errors were anticipated and answered in the Does' opening brief ("Doe Br.")[2] and others are unimportant. However, a few additional inaccuracies were not anticipated, are significant, and do in light of the issues presented deserve a response.

The State suggests that the Does demonstrated a lack of concern for their children prior to and during the TPR proceeding. State Br. 6-7. The truth is to the contrary. The Does went so far as to undergo sterilization procedures on the understanding that this would assist them in regaining their children. Doe Br. 7. They sought to visit their children after the State took them away, but the State refused to respect the visitation rights originally provided for by the custody order (see Doe Br. 10 & n.17); and they began

[2]For example, there is no finding below, and the evidence does not establish, that Doe had a "history of alcohol problems" (compare State Br. 2 with Doe Br. 9 & n.14, 42), or sexually toyed with his infant daughter (compare State Br. 5 with Doe Br. 6) or "emotionally damaged" her (compare State Br. 5 with record citation at Doe Br. 10 indicating that it was State foster care including nine changes of foster placement that injured her).

contempt proceedings against the State to enforce those visitation rights which the State then succeeded in eliminating. *Id.* They have also pursued this litigation through two hearings and three appeals because of their concern for their children.

The State also infers a lack of concern on the ground that "the children have not seen [the Does] for five years . . . ." State Br. 20. The fact is that the Does have not seen their children because the State has not revealed their whereabouts and has resisted visitation rights. Although the Does did seek a stay of the TPR order pending appeal following the full hearing in the Superior Court, the State successfully resisted the stay application.[3] Doe motion to stay pending appeal, Dec. 7, 1977; State answer, Dec. 14, 1977.

Finally, the State implies that the children are now in foster homes where they could or would be adopted if the termination of parental rights becomes final. State Br. 9-10. This Court cannot fairly consider such an assertion. The State successfully resisted at trial any consideration of what would happen to the children if termination occurred (see J.S. App. 15a; Tr. 352-62, 367, Dec. 20, 1976) and there is nothing in the record about their present status. Moreover, the State has refused to give lead counsel for the Does access to records that would disclose what has happened to the children since they were taken from their parents.

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[3]The State also asserts that at oral argument in the Delaware Supreme Court in 1978 the parents' counsel did not know where they were. State Br. 20. In fact, counsel talked with both parents within a few weeks before oral argument and met with Jane Roe personally. Counsel not only knew where the parents were living but it is his best recollection that he gave that information to the Delaware Supreme Court at the outset of oral argument. *Cf.* J.S. App. 5a.

B. The Delaware Statute Is Unconstitutionally Vague.

The Does' opening brief demonstrated that the Delaware statute is unconstitutionally vague in terminating parental rights based solely on standards of unfitness and best interests. The State responds that the Delaware Supreme Court has explicated the concepts of unfitness and best interests so that "narrowing court interpretations" rescue the statute. State Br. 14-15. The short answer to this argument is that the Delaware Supreme Court affirmatively refused to offer a narrowing construction: it asserted below that "precise definition" was not required (J.S. App. 7a), and earlier it had declared that "each case must be decided on its own peculiar facts." *In re Dingee,* 328 A.2d 139, 140 (Del. 1974).[4] Certainly the Superior Court in this case gave no sign that it was aware of or was applying any narrowing construction of the Delaware statute.

The State also asserts that similarly vague language has been used in TPR statutes by a number of states in the past (State Br. 14), but longevity is not an excuse for perpetuating constitutional error. Especially where human rights are concerned, this Court has not hesitated to reverse even its

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[4]Similarly, the State's brief cannot construct a "narrowing" interpretation by stringing together scraps of statements from Delaware decisions which include circular assertions of the Delaware Supreme Court that "not fitted" means "unfitted" (J.S. App. 7a) or that "the attending circumstances" must be considered in each case. *In re Dingee, supra,* 328 A.2d at 140, paraphrasing *Clarke v. Lyon,* 118 N.W. 472 (Neb. 1908).

own prior constitutional decisions where appropriate.[5] This Court has never upheld a TPR statute against a vagueness attack, so no change in position is involved. Where, as here, other state statutes and model codes have shown that flexibility can be combined with greater guidance, there is no excuse for tolerating the Delphic standards used by Delaware, standards providing judges and litigants alike with virtually no guidance or predictability.

The State misreads Mr. Justice Stewart's reference to unfitness and best interests if it interprets his statement as an endorsement of those terms against a charge of undue vagueness.[6] The reference occurred in a passage refuting as a matter of substantive law the notion that the State could separate parents and children merely because the State deemed it in the children's best interest; and neither case where the reference appears involved a vagueness challenge. A shorthand reference to the need for misconduct certainly cannot be taken to mean that the statute is sufficiently precise when it fails to define the kind of unfitness that justifies termination of parental rights.

C. The Burden of Proof Is Unconstitutional.

The Does' opening brief showed that, at the very least, clear and convincing evidence is necessary to support

[5]See, *e.g.*, *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Baker v. Carr*, 369 U.S. 186

[6]In *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-63 (1977), Mr. Justice Stewart said in his concurring opinion that the state could not break up a natural family without some showing of unfitness and for the sole reason that the breakup was thought to be in the children's best interest. The same language was subsequently quoted in *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978), a decision generally damaging to the State's position. See Doe Br. 16, 36.

termination of parental rights. That requirement is consistent with *Addington v. Texas*, 441 U.S. 418 (1979), with numerous state decisions and statutes (Doe Br. 32), with the most modern model code (Doe Br. 33), and with the rationale that has informed this Court's decisions on burden of proof requirements. Doe Br. 26-27. Indeed, the principal federal statute—the Indian Child Welfare Act—requires proof beyond a reasonable doubt for termination of parental rights. Doe Br. 33.

The State's brief argues that clear and convincing evidence is not required because the parents' interests are opposed to those of the children and a clear and convincing standard would prefer the former to the latter. State Br. 25. This argument begs the very question at issue in TPR proceedings, for the parents' and children's interests may well be identical: both may be resisting the meddlesome and unwarranted intrusion of the state bureaucracy. In all events, the reason for requiring more than a preponderance of the evidence is not to prefer the interests of either the parents or the children. It is to emphasize for the fact finder the drastic consequences of a TPR judgment, to reflect the constitutional premise that maintenance of the family unit is the preferred solution, and to impose a consonantly heavy burden upon anyone seeking to sever the family.

The State also argues that the constitutional error should be disregarded because the parents below argued for proof beyond a reasonable doubt rather than clear and convincing evidence. In fact, the Does' argument was a broader one designed to secure an evidentiary "standard beyond a mere preponderance." Doe Reply Br. 17. While the Does supported a requirement of proof beyond a reasonable doubt, they expressly cited the adoption of a clear and convincing standard in both the *Addington* decision and in

the *Alsager* case.[7] In addition, since the Delaware Supreme Court expressly rejected any higher requirement than preponderance of the evidence, it is apparent that the central question was in fact litigated and decided below.

Finally, if the Court concludes—as we believe is likely—that the Delaware statute is unconstitutionally vague, Delaware and a number of other states will have to revise their existing statutes. In doing so, it would clearly be useful for the states to know whether a higher burden of proof is required and what that burden is, so that the new statutes can be shaped accordingly. This is a further reason for seeking to resolve definitively the burden of proof issue, which was properly raised below.

D. A Finding of Harm Is Constitutionally Required.

There was below no finding that the Doe children had suffered or would imminently suffer significant harm from remaining with their parents. The focus of the decisions below was on parental conduct in the abstract (unemployment, half-sibling relationship of the parents, relocations); and a decision that the children's "best interests" would be served by termination is *not* equivalent to finding that the parents are incapable of raising their children without significantly harming them. See *Quilloin v. Walcott, supra,* 434 U.S. at 255. A finding of harm is a minimum prerequisite of substantive due process in view of the protected nature of the family relationship and the lack of any other

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[7]Doe reply brief (p. 21) in the Delaware Supreme Court, citing *Alsager v. District Court,* 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd per curiam,* 545 F.2d 1137 (8th Cir. 1976), as requiring "clear and convincing evidence" in termination; Doe motion for reargument (pp. 8-10) in the Delaware Supreme Court citing *Addington,* together with state cases requiring clear and convincing evidence.

proper basis for forcibly terminating parental rights and duties. See Doe Br. 34-44.

While the State's brief argues that no "compelling" state interest need be shown to justify termination, this Court's constitutional decisions protecting family autonomy clearly do require a compelling state interest to justify drastic intervention. Doe Br. 35 & n.58. Even if some less demanding test were applied, in a TPR context nothing other than a finding of harm could bear a "rational relationship" to a legitimate state purpose. To take children from their parents merely to punish conduct deemed improper, but not shown to harm the children, would be manifestly cruel and unusual (see Doe Br. 37 n.61); and this Court in the *Quilloin* case specifically rejected the notion that termination could be justified merely to secure what state officials deemed to be the children's best interests. 434 U.S. at 255.

The State also argues that harm was in fact done to the children (State Br. 30) but its contention rests on fragments of disputed evidence and not on any *finding* of harm by the trial court. At the very least, the requirement that harm be found means that harm must be found *explicitly* by the trier of fact and that the finding must be supported by evidence.[8] An ultimate finding in explicit terms, together with a statement of supporting facts, is hardly too much to demand of a trial court before a family is involuntarily divided and children permanently taken from their parents.

The State contends that the substantive due process issue was not raised below in proper fashion. There is no dispute that the Does did argue for a requirement of harm, denominating their constitutional objection to the lack of harm as one based on "substantive due process." Doe motion for

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[8]See, *e.g.*, *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (required finding of malice or recklessness in public figure libel case); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (finding of danger to self or others required for confinement for mental illness).

reargument in the Delaware Supreme Court (pp. 11-12).[9] In all events, the lack of such a finding is plain constitutional error which this Court is entitled to consider in a case otherwise properly before the Court on related issues.[10] Given the states' need for guidance in any effort to enact more specific statutes, the resolution of this issue is doubly appropriate.

II.

THE FURTHER ISSUES RAISED BY THE STATE OR AMICI DO NOT ALTER THE APPROPRIATE DISPOSITION.

A. The Change in Statutory Language Does Not Affect the Case.

On June 30, 1980, after the Does had filed their opening brief and after this Court had recessed for the summer, the Delaware legislature enacted without public hearings new statutory language (reprinted in State Br. App. B) revising the unfitness standard—but not the best interests standard—utilized in the preexisting statute. While the new unfitness standard is slightly more complex, the changes are essentially cosmetic from the standpoint of this case. The new standard continues to turn on language of extraordinary vagueness ("plan adequately" for "physical needs" or

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[9]It was not until the Delaware Supreme Court finally rejected the Does' argument as to how the statute should be construed under state law that this constitutional issue could be definitively presented.

[10]See Sup. Ct. R. 34.1(a). *E.g., Washington v. Davis,* 426 U.S. 229, 238 (1976).

"emotional health or development");[11] no finding of harm is required;[12] and there is no requirement that proof be by evidence beyond a mere preponderance.

Enactment of the statute does not in any way moot the present case—and the State does not claim otherwise—nor lessen the need for a swift resolution on the merits of the Does' rights and status. The TPR judgment entered below remains based upon an unconstitutional statute and procedure. The parents have been separated from their children for five years; and if there is any further significant delay in moving toward resolution, the Doe children, taken from their parents as infants and still comparatively young, will be teenagers before this litigation is concluded.

Nor does the change in statutory language reduce the public interest in a swift resolution of the basic legal issues presented. The constitutional burden of proof and substantive due process issues are not affected *in any way* by the statutory change; and vagueness inheres in the new adequate planning language to almost precisely the same degree as in the unfitness language. All of these constitutional defects persist in the statutes of a significant number of states, including Delaware, affecting thousands of cases every year. As this Court implicitly recognized in noting probable jurisdiction, these defects present significant constitutional issues that need to be answered now.

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[11]For children like the Does not in the home of a stepparent or blood relative, the new standard in substance replaces the old phrase "not fitted" with the phrase "are not able, or have failed, to plan adequately for the child's physical needs or his mental and emotional health and development." Although there are additional conditions, they do not clarify or refine the concept of adequate planning on which the TPR statute now pivots.

[12]On the contrary, far from requiring significant harm either present or imminent, the adequate planning criterion sounds suspiciously like a social worker's predictive judgment; and at best, it resembles the best interests standard which this Court has said is not sufficient basis for termination.

B. No Right to Counsel Claims Are Properly Presented.

Two distinct right to counsel arguments are advanced by various of the amici. One argument is that children in a TPR proceeding are entitled to separate counsel at the evidentiary hearing, as some lower courts have held. *E.g.*, Legal Aid Br. 7. The other argument is that the present case cannot proceed to judgment in this Court until separate counsel for the children are appointed to brief and argue the issues presented. See NACC Br. 7.

The need for separate counsel in TPR hearings may deserve review by this Court, but not at the present stage of the present case. The issue was not litigated below or decided by the lower court. It was not briefed in this Court by the Does, and the State's substantive discussion of the issue is confined to a single paragraph and refers only to one of the many pertinent precedents. State Br. 22. In view of the widespread impact of requiring separate counsel in all TPR cases it would be inappropriate to decide the issue in the present context.

The quite different suggestion of one of the amici (NACC)—that separate counsel is now required *in this Court* in this case—is frivolous. Whatever role separate representation of the children might play in a trial court evidentiary hearing, a requirement of separate counsel to brief and argue now could contribute nothing (other than delay) in resolving the clear-cut legal issues presented by this case. If there are more than two viewpoints on the merits issues, the amici have already had ample opportunity to submit such views from the perspective of those who represent children, so the Court already has the benefit of that perspective.[13]

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[13]NACC's citation (p. 7) to the Federal Rules of Civil Procedure is inapt as they do not apply in this Court (see Fed. R. Civ. P. 1), and there

(continued)

C. No Issue of Retroactivity Is Properly Presented.

The same amici brief suggests that, even if the Does' parental rights were unconstitutionally terminated and this Court so holds, it may be inappropriate to give the Does the benefit of the constitutional holding. NACC Br. 23-34.[14] Where constitutional objections have been asserted in a TPR proceeding and pursued vigorously by direct appeal, no basis exists—if the constitutional objections are sustained—for depriving the litigants of the benefits of such a resolution in their own case. However the Court might later resolve other situations (*e.g.*, collateral attacks in cases where the TPR decision has become final and no longer subject to direct review), no retroactivity issue is presented in this case.[15]

NACC's citations to federal cases alleged to support possible "non-retroactivity" are misleading to a remarkable degree. Two of the cited cases,[16] which did concern parental

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(footnote continued from preceding page)
is no principle that forbids adjudication of an issue in an appellate court because unrepresented persons may be affected. Compare NACC Br. 16. Determinations by this Court definitively affect absent parties all the time (*e.g.*, other litigants with pending or future cases presenting identical legal issues).

[14]Although the NACC brief refers to this as a question of retroactive or non-retroactive application, it is not normally deemed a retroactive application of a rule of law to apply it to the party who asserted that position in the trial court and vindicated his or her position on direct appeal.

[15]The requirements of specificity, clear and convincing evidence, and harm are designed not to achieve extrinsic purposes but to achieve a just verdict on the merits. *Cf. Brown v. Louisiana,* 48 U.S.L.Wk. 4719 (U.S., June 16, 1980).

[16]*Syrovatka v. Erlich,* 608 F.2d 307 (8th Cir. 1979); *State v. Lutheran Social Services,* 178 N.W.2d 56 (Wis. 1970), *vacated and remanded,* 405 U.S. 1051 (1972).

rights, involved indirect attacks through habeas corpus on previous final terminations or adoptions. Such cases therefore present a conventional issue of retroactivity precisely because—unlike the present case—the state action sought to be undone had previously become final and was no longer subject to direct appeal. The other principal case cited, *Lemon v. Kurtzman,* 411 U.S. 192 (1973), did not involve parental rights at all but, as the Court explicitly stressed, the fashioning of an equity decree based upon the "broad discretionary power" that governs such relief. See *id.* at 199-201.

If this Court does find constitutional error in termination of the Does' parental rights, then the proper disposition is to order the reversal or vacation of the TPR decree. The Does will not, of course, have an immediate legal right to regain custody of their children since custody orders are outstanding. On the other hand, the State's brief has misrepresented the Does' position in claiming that they seek only "simple 'contact' " with their children, which (the State implies) will disrupt adoption proceedings that might otherwise occur. State Br. 10. See also *id.* at 12.

After reversal or vacation, the State remains free to bring a TPR proceeding consistent with constitutional requirements; and the parents remain free to seek not only contact but custody of their children through appropriate proceedings. Once the stigma and barrier of the TPR decree are removed, it is always possible that the case can be resolved without further litigation. The Does cannot judge what course may be best for them and their children until they learn what has become of their children. Only the tone of the State's brief makes it necessary to add that the Does have not maintained this litigation, through two hearings and three appeals over the course of five years, in order to cause injury to their own children.

CONCLUSION

For the reasons stated above and in the Does' opening brief, the judgment below should be reversed.

Respectfully submitted,

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ON APPEAL FROM THE SUPREME COURT OF DELAWARE

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

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Cases (cont'd)

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Matter of Three Minor Children, 406 A.2d 14 (Del. Sup. Ct. 1979). 36

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Painter v. Bannister, 258 Iowa 1390, 140 N.W.2d 152, cert. den., 385 U.S. 949 (1966). 25

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Roe v. Wade, 410 U.S. 113 (1973). . . 14, 15, 18

Scott v. Illinois, 440 U.S. 367 (1979) 29

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Cases (cont'd)

Skinner v. Oklahoma, 316 U.S. 535 (1942) 18

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Del. Fam. Ct. R. 320. 32

Del. Fam. Ct. R. 360. 32

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Other Authorities

Cal. Legislature Joint Legislative Audit Comm., Report of the State's Role Foster Care In California (No. 148.2, 1974). 23

Children's Defense Fund, Children Without Homes (1978) 20, 22

Goldstein, Freud and Solnit, Beyond the Best Interests of the Child (1973). 25, 26

Gruber, Foster Home Care In Massachusetts: A Study of Foster Children, Their Biological And Foster Parents (1973). 27

Institute of Judicial Administration/ American Bar Association Joint Commission on Juvenile Justice Standards, Standards Relating to Abuse and Neglect. 31

Jeter, Children Problems and Services in Child Welfare Programs (1963) 23

Kadushin, Child Welfare Services (McMillan & Co., 1968) 21

Katz, When Parents Fail (Boston: Beacon Press, 1971). 27

Levine, "Substitute Child Care: Recent Research and Its Implications," Welfare in Review, Vol. 10, no. 1. 24

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Other Authorities (cont'd)

Maas and Engler, Children In Need of Parents (N.Y.: Columbia University Press, 1959). 24

Mandell, Where Are The Children? (D.C. Heath & Co. 1973). 23, 24

Mnookin, Foster Care - In Whose Best Interests, 43 Harv. Ed. Rev. 599 (1973). 23, 27

Nemovicher, "A Comparative Study of Adopted Boys and Non-Adopted Boys In Respect of Specific Personality Characteristics," (Ph.D. dissertation, School of Education, New York University, 1959). 24

Note, Developments in the Law -- The Constitution and The Family, 93 Harv. L. Rev. 1156 (1980) . . . 10, 37

Wald, State Intervention on Behalf of Neglected Children: Standards for Removal of Children From Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. 625 (1976). 25

Wald, State Intervention on Behalf of Neglected Children: A Search for Realistic Standards, 27 Stan. L. Rev. 985 (1975) 25

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Other Authorities (cont'd)

Weinstein, Self Image of the Foster Child (1960). 26, 27

Wolins, "Another View of Group Care," Child Welfare, Vol. 44, no. 1 (January 1965). 23

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INTEREST OF AMICUS*

The American Civil Liberties Union is a nationwide non-partisan organization of more than 200,000 members dedicated to defending the principles embodied in the Bill of Rights. The Children's Rights Project is a special project of the ACLU

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* Letters of consent from the parties to the filing of this brief *amicus curiae* have been filed with the Clerk of the Court.

dedicated to asserting and defending the rights of children. Central among those rights are the child's right to a stable home and to a parent-child relationship free from unwarranted state intrusion. The Children's Rights Project has participated in numerous cases throughout the United States involving the respective rights of parents and children in termination proceedings as well as cases directed at improving conditions for children who have been removed from their homes and placed in the custody of the state.

INTRODUCTION AND STATEMENT OF THE CASE

This case originated on July 2, 1975, in Delaware Superior Court when the Delaware Department of Health and Social Services (hereinafter "the Department") filed a petition seeking to terminate the parental rights of John Doe and Jane Roe with regard to their five children. On September 12, 1975, without appointing counsel to represent the children, and without considering the alternative placement options available for the children, the Superior Court summarily terminated the parents' and children's rights to continue their family relationship, upon finding that evidence concerning the parents demonstrated that they were "not fitted" to continue to exercise parental rights.[1/]

1/ The sole Delaware statutory basis for termination of parental rights presented by the Department's petition was 13 Del. Code § 1103(4), which provides for termination when:

> the parent or parents of any such child, or any person or persons or organization holding parental rights over such child are not fitted to continue to exercise parental rights.

This statute is the only Delaware statute challenged by parent-appellants in this Court.

However, this initial determination was reversed and the case remanded by the Delaware Supreme Court on September 28, 1976, because the trial court had neglected to make a determination concerning whether termination of parental rights was in the "best interests of the child," which the Delaware Supreme Court held to be another "essential prerequisite for an order of termination of parental rights" under 13 Del. Code § 1108.[2] (Appendix at 1c.)

Upon remand, and following another hearing, the trial court again terminated parental rights in a letter opinion dated December 30, 1976. (Appendix at 1d) Once again the court failed to appoint separate counsel for the children, or to investigate

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2/ 13 Del. Code § 1108 provides, in relevant part:

> (a) Should the Court find the termination of existing parental rights and their transfer to be in the best interests of the child, it shall make an order terminating such rights in the parent or parents . . . and transferring them to some other person or persons or authorized agency or the state Department of Health and Social Services as may, in the opinion of the Court, be best qualified to receive them.

(emphasis added)

the placement options available for them. The only testimony presented at the hearing on remand by any expert witness who had actually interviewed the children indicated that they had a "good relationship" with their parents. The trial court's December 30, 1976, letter opinion included the stated conclusion that "it is in the best interests of the children that" their relationship with their parents be terminated, (Appendix at 3d) as the Delaware Supreme Court had instructed, but it did not include a single word indicating why this was so. Although the particular matters considered upon remand were different, every specific finding in the December 30, 1976, trial court opinion concerned the parent's behavior and "fitness," not the children's separate "interest" in the termination.

As far as the children's separate "interest" was concerned, the proceedings upon remand were thus utterly redundant: the second trial court opinion merely recapitulated the first opinion, with the hollow addition of the single new phrase quoted above. The Delaware Supreme Court specifically noted, in reviewing the second trial court opinion, that the trial court had refused to admit or consider evidence

concerning "post foster home placement or evidence as to the State's planning for the future of the children," (Appendix at 15a) but that court nonetheless affirmed the second trial court decision on August 24, 1979.

On March 24, 1980, this Court noted probable jurisdiction of this appeal from the Delaware Court's August 24, 1979, judgment with regard to three questions: whether the Delaware statute's "not fitted" standard for terminating parental rights is unconstitutionally vague, whether parent-child relationships can be terminated by the state upon an ordinary "preponderance of the evidence" test, and whether due process requires the state to demonstrate a compelling state interest before terminating parental rights.

However, despite the five-year long history of this case, another set of critical questions concerning the individuals who have the most to gain or lose from these proceedings has not been presented to either of the courts below or raised in this Court. The decision of the Delaware Supreme Court did not merely rest upon a vague statute concerning the issue of parental "fitness." It also rested upon a conclusion that

termination of parental rights was "best" for these children, under a legal standard that was just as vague on its face as the "unfitness" statute challenged by the parent-appellants and that was applied to these children without the slightest inquiry into what the future might actually hold for them. Moreover, although the Delaware Supreme Court specifically acknowledged that parents, children, and the state have distinct interests in proceedings to terminate parental rights (Appendix at 10a-11a), it nonetheless permitted a final judgment affecting fundamental liberty interests to be entered following a trial at which only two of those three parties were represented by counsel.

These five children -- incompetent as a matter of law to represent their own interests -- thus had their most basic human rights finally adjudicated by an American court without the benefit of counsel, and without the the introduction of a scintilla of evidence to show that the essential state law pre-requisites for such a drastic and permanent curtailment of their most fundamental freedoms existed in fact. Indeed, these children's interests

are not even independently represented in this Court.

The result of the lower courts' failure to assure that the children's separate interests be represented by separate and independent counsel has been a proceeding that is fundamentally unfair, under the Constitution, and inadequate under the plain meaning of state law. Consequently, this Court should remand this case for further factual findings concerning the children's true "best" interest in a proceeding where the children are separately represented by independent counsel or a guardian ad litem. Where a statutory prerequisite for termination has not been established by evidence, and where the state's highest court has knowingly permitted a concededly separate, constitutionally cognizable interest to go wholly unrepresented, fundamental fairness requires such a remand.

This is not to concede, however, that termination of parental rights is constitutionally permissible merely upon a showing that it is in the child's "best interest" to do so. The point is, rather, that even constitutionally adequate substantive

standards may not be applied in an unfair proceeding. For this Court even to address the substantive standard on the basis of the record presented here would violate these children's due process rights.

SUMMARY OF ARGUMENT

Numerous prior holdings of this Court have acknowledged,and by now clearly established, the extraordinary protection the Constitution affords to family life.

Yet while the family as a unit has certain clearly established rights as against the state, the proper apportionment of these rights among the various members of a family still presents difficult and novel questions. Particularly difficult is the situation presented when the state seeks to intervene in a family on behalf of one family member against another. See generally, Developments in the Law -- the Constitution and the Family, 93 Harv. L. Rev. 1156, 1221-1242 (1980). In such parent-child conflicts, ordinary presumptions concerning the identity of parent-child interests, see Parham v. J.R., 442 U.S. 584 (1979), cannot be indulged. On the other hand, to concede that the normally identical interests of parent and child are in conflict whenever the state seeks to intervene -- and that the state is always fit to represent the child's interest in such situations -- is to concede the state its case before it makes a factual showing.

A review of current constitutional doctrine makes clear that children, as well as adults, have a fundamental, constitutionally-protected interest in the integrity of their family life, and that their interest is legally and practically distinct from the interests of the other parties to a parental termination proceeding (Point I). Consequently, only the mandatory provision of separate counsel to children involved in such proceedings can assure that state intervention in family life is accomplished in a manner that is fundamentally fair (Point II).

POINT I

THE CHILDREN'S SEPARATE INTEREST IN PROCEEDINGS TO TERMINATE PARENTAL RIGHTS IS CONSTITUTIONALLY "FUNDAMENTAL" AND ITS RECOGNITION BY THIS COURT IS OF THE HIGHEST PRACTICAL IMPORTANCE TO THE CHILDREN'S LIVES

A. The Prior Rulings Of This Court Clearly Establish The Fundamental Nature Of The Rights Of Parents And Children To The Integrity Of Their Families.

This Court has made it abundantly clear that individuals have a right to privacy and autonomy in their family lives that is entitled to the most rigorous substantive and procedural constitutional protection. Thus, it is beyond serious question that the family unit enjoys a right to be free of unwarranted state interference except under the most compelling circumstances.[3] See,

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[3] It is also clear, as parent-appellants have argued, that determining such fundamental rights according to an ordinary "preponderance of the evidence" test is constitutionally inadequate. It is plain that severing a parent-child relationship forever is at least as serious an abridgement of personal liberty interests as a temporary, and reversible, commitment to an institution for the mentally ill. Yet the Court has already held the "clear and convincing" standard to apply to such cases. See Addington v. Texas, 441 U.S. 418 (1979).

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e.g., Parham v. J.R., 442 U.S. 584 (1979); Zablocki v. Redhail, 434 U.S. 374 (1978); Moore v. City of East Cleveland, 431 U.S.

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As the Court pointed out in that case,

> Increasing the burden of proof is one way to impress the fact-finder with the importance of the decision and thereby perhaps reduce the chances that inappropriate commitment will be ordered.

Addington v. Texas, supra, at 427. As this Court has already noted, "judges. . . may find it difficult, in utilizing vague standards like 'the best interests of the child,' to avoid decisions resting on subjective values." Smith v. OFFER, 431 U.S. 816, 835 (1977). Where the substantive standard for a government determination affecting fundamental rights is so intrinsically elusive and inherently subjective as those ordinarily applied in termination proceedings, "impressing the factfinder with the importance of the decision" is all the more important. In framing the analogous federal standard in this area, Congress has recently provided, with regard to Native American children, that

> No termination of parental rights may be ordered . . . in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1912(f) (emphasis added). The federal standard thus requires both a higher degree of certainty on the part of the fact-finder and a more narrowly focussed factual finding than does Delaware.

494 (1977); Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Roe v. Wade, 410 U.S. 113 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Loving v. Virginia, 388 U.S. 1 (1967); Pierce v. Society of Sisters, 268 U.S. 510 (1925). Although the right to privacy and autonomy in family life clearly antedates the Constitution, and is presupposed by it, it is not specifically mentioned in the Constitution. Nevertheless, the Court has found it to permeate the entire Bill of Rights, and has derived its specific holdings in this area from the First, Ninth and Fourteenth Amendments. See, Roe v. Wade, supra at 152-53. Regardless of its uncertainty concerning the precise textual basis of this right, the Court has throughout this century been completely consistent in acknowledging the existence of a "private realm of family life which the state cannot enter." Prince v. Massachusetts, 321 U.S. 158, 166 (1944). See also Moore v. City of East Cleveland, supra, at 499; Smith v. Organization of Foster Families for Equality and Reform, supra, at 842.

The Court's consistent recognition of

this right to family integrity has frequently derived from its general concern for individual privacy, Griswold v. Connecticut, 381 U.S. 479, 486 (1965); Roe v. Wade, supra at 152-53; Carey v. Population Services International, 431 U.S. 678, 687-89 (1977), as well as the fundamental freedom of individuals to associate without first seeking the approval of the state. See Moore v. City of East Cleveland, supra. See also Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1979); Stanley v. Illinois, supra. But the Court has also specifically recognized the unique and special function the family performs in our society in a manner that is directly relevant to the issues presented here.

In Moore v. City of East Cleveland, the Court said

> Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural. Moore v. City of East Cleveland, supra, at 503-4. (footnotes omitted)

Created by history and tradition, of primary "moral and cultural" value as well as fundamental constitutional significance, the family is thus something more than just another protected legal entity.

The less serious a state intrusion into family life, of course, the less the Constitution requires by way of justification, whether the intrusion concerns state limitations on absolute parental authority, see, e.g., Prince v. Massachusetts, supra, or on the autonomy of a child. Parham v. J.R., supra. However, when the state seeks to extinguish the tie that binds parent to child permanently, only the most "powerful countervailing interest[s]" can outweigh the rights abridged by termination. See, Stanley v. Illinois, supra, at 651. When fundamental rights are absolutely threatened (as opposed to when lesser rights are merely limited), the Constitution requires that the proposed state intrusion be tailored precisely to fit the legitimate end the state seeks to achieve. Zablocki v. Redhail, supra, at 388. Consequently, when the proposed state intrusion is permanent termination of the rights of parent and child to have any relationship at all with each other and when the

declared aim of this intrusion is the child's "best interests," the state must meet a particularly heavy burden.[4/]

[4/] Amicus sees no conflict between its position and the position of parent-appellants concerning the alleged vagueness of 13 Del. Code § 1103(4), permitting termination upon a finding that the parent is "not fitted to continue to exercise parental rights." That statute is so lacking in definiteness that a parent of common intelligence is incapable, with the best of intentions, of conforming his or her behavior to its requirements. See generally Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). Of greater importance to the issues presented in proceedings to terminate parental rights, however, is that strand of the "void for vagueness" doctrine which concerns the excessive discretion accorded to administrators or enforcement officials by vague statutes. See Grayned v. City of Rockford, 408 U.S. 104 (1972). The extraordinary danger of discriminatory and arbitrary enforcement, where the government official is required to evaluate the general capacity of another person, ordinarily a member of a different social class and frequently of a different racial and cultural background from the decision-maker, in the complex and intrinsically subjective field of "good" child-rearing is self-evident. Moreover, a child whose relationship with a parent is severed unnecessarily is harmed by that loss even more than the parent. See Alsager v. District Court of Polk Co., Iowa, 406 F. Supp. 10 (S.D. Iowa), aff'd 545 F.2d 1137 (8th Cir. 1976).

Although the Court has most frequently elaborated the constitutional rights of families in the context of defending parents against the state, see, e.g., Meyer v. Nebraska, 262 U.S. 390 (1923); Skinner v. Oklahoma, 316 U.S. 535 (1942); Cleveland Board of Education v. LaFleur, supra; Griswold v. Connecticut, supra; Roe v. Wade, supra; Stanley v. Illinois, supra; Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, supra, a careful examination of its decisions shows that "family rights" as against the state inhere separately and reciprocally in the children as well. For example, the Court held in Smith v. Organization of Foster Families for Equality and Reform, supra, at 844 that the constitutional protection accorded to the family was based on the "emotional attachments that derive from the intimacy of daily association." It is plain that all such intimate "emotional attachments" are necessarily reciprocal ones, in which each of the participants has a linked, but plainly separate, interest. Similarly, in Quilloin v. Wolcott, supra, the primary basis of the Court's decision was the existence of a reciprocal, caring relationship form which the child actually derived ongoing emotional support

and sustenance, even though that relationship was counterposed against a "natural family" link. See, e.g., Quilloin v. Walcott, supra. In light of these holdings, and the well-established rule that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," In re Gault, 387 U.S. 1, 13 (1967), it is clear that children's interests in termination proceedings are separate from parents' interests, and are at least as significant in clearly settled constitutional terms as the interests of parents.

B. The Children's Separate Interest In Proceedings To Terminate Parental Rights Is Especially Great Because Of the Further Constitutional Deprivations Which Often Result.

Although parents and children have reciprocal, and therefore equal, interests in their "emotional attachments that derive from the intimacy of daily association," the interest of the child in proceedings brought by the state to terminate parental rights is distinguishable from the parents', and is even greater. For the parent, termination of parental rights means losing his or her "emotional attachment" with someone else. For the child, it means losing those attachments, but it also means being

swept into the permanent custody of a child welfare bureaucracy, which acquires plenary power to make unreviewable decisions affecting all of the child's constitutional and other rights. In theory, this enhanced state power will always be exercised benevolently. In practice, it is not. Consequently, it is the child, rather than the parent, who stands to lose the most in a proceeding to terminate parental rights. The child loses everything the parent loses, and usually much more.

Termination of parental rights is often justified as a necessary prerequisite to moving a child into a new adoptive home. The fact is, however, as study after study has demonstrated, that children remain for years, often throughout their entire childhood, in the legal limbo of foster care, being moved from place to place, without ever being provided with a permanent adoptive home.5/

5/ See, Children Without Homes at p. 6 (Report prepared by the Chilren's Defense Fund, 1978)

> Children remain in care for long periods of time, often moving from place to place, without the chance to experience stable caring from any adult. In our survey, 13 percent of the children had been out of

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Independent of the anguish children experience whenever they are permanently separated from their parents and siblings is the negative impact of foster care itself. Because of the shortage of dedicated and concerned foster families, states are often forced to place children inappropriately in families or impersonal institutions where their needs cannot be met.[6/] Additionally, studies indicate a high incidence of physical abuse or mistreatment

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> their own homes for over four years, and an additional 20 percent for over six years. In all, 52 percent had been in out-of-home care for two or more years. Moreover, the responding survey counties reported that 18 percent of the children in out-of-home care had been moved more than three times.

6/ See, A. Kadushin, Child Welfare Services, at 415 (McMillan & Co., 1968):

> There is still a general problem finding a sufficient number of adequate foster homes. An even greater problem is the difficulty of finding foster homes for emotionally disturbed children, mentally defective children, and children of minority racial backgrounds. The problem is further complicated by the fact that most foster parents want younger, preschool children, while many children needing foster care are older.

in such institutions or homes,[7] indicating that termination does not necessarily safeguard children from experiences that can damage them emotionally or psychologically -- and that termination may damage them even more than remaining in their natural family would have done. And even if a child is not physically abused in foster care, a child in state custody is still highly likely to be subjected with alarming frequency to the extremely damaging phenomenon

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[7] Children Without Homes at p. 6. (Report prepared by the Children's Defense Fund, 1978):

> Despite immense public concern about familial abuse, no state CDF staff visited had set up mechanisms, nor issued guidelines to monitor and eliminate the institutional abuse of children. Such abuse takes many forms: the unmonitored, excessive use of seclusion or drug therapies, severe behaviorial restrictions, or harsh physical punishment. Despite evidence that abuse of children in institutions and other group settings is widespread, no state studied had licensing statute spelling out specific sanctions for institutional abuse.

of multiple placements.[8] It is well-established that when children are moved from place to place, new attachments are severed and expectations of continuity, permanency and stability are shattered. As a result, children learn to avoid forming meaningful new relationships in order to avoid re-experiencing the trauma of separation.[9] Studies demonstrate the destructive

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[8] See, Cal. Legislature Joint Legislative Audit Comm., Report Of The State's Role Foster Care In California 7-8 (No. 148.2, 1974); H. Jeter, Children Problems and Services in Child Welfare Programs, 82 (1963); Mnookin, Foster Care - In Whose Best Interests, 43 Harv. Ed. Rev. 599, at 622-26 (1973); B. Mandell, Where Are The Children? 72, n. 10 (D.C. Heath & Co. 1973):

> A recent Seattle study showed that more than 6 of 10 foster children had undergone four or more moves. Half had been moved from four to seven times, and 12% had between eight and seventeen different placements. Only 5% remained in one home. (Jaffee and Kline, New Payment Patterns, p. 46.) Such dismal statistics clearly put the burden of proof upon the state to demonstrate that the state is, in fact, the better parent.

[9] See, Martin Wolins, "Another View of Group Care," Child Welfare, vol. 44, no. 1 (January 1965) at 15-16.

> The identity of a child in (a foster home) is often unclear, his stay is uncertain. He will probably find himself a wanderer, packing his affections, if any, and his problems and transferring them to at least several foster homes before he matures.

and potentially sociopathic consequences of such emotional trauma.[10/]

10/ J. Nemovicher, "A Comparative Study of Adopted Boys and Non-Adopted Boys in Respect of Specific Personality Characteristics," (Ph.D. dissertation, School of Education, New York University, 1959). Nemovicher compared thirty adopted boys with the same number of non-adopted boys and found that the adopted boys differed significantly from the control subjects in being more hostile, tense, dependent and fearful. See also Abraham S. Levine, "Substitute Child Care: Recent Research and Its Implications," Welfare In Review, vol. 10, no. 1, p. 3; B. Mandell, Where Are The Children?, at 72, n. 9 (D.C. Heath & Co. 1973):

> Maas and Engler [H. Maas and R. Engler, Jr., Children in Need of Parents, (N.Y.: Columbia University Press, 1959)] found that in the New England town of Brighton, foster children became more psychologically disturbed while in foster care than when they first came into care. Sixty-one percent of the foster children were confused about their identity. The children who returned home, however, were less likely to have psychological symptoms than were the children who stayed in foster care.

In addition to the harms and risks a child is exposed to while in foster care is the trauma a child invariably suffers upon being separated from a parent -- even an "unfit" one, and even when the separation has been performed in his or her "best interests."[11/] A child cannot so quickly

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11/ See, J. Goldstein, A. Freud and A. Solnit, Beyond the Best Interests of the Child, 20 (1973). Petitioners' relationship with their children was terminated on the basis of evidence which failed to indicate the children had suffered or would suffer specific articulable harm were the relationship allowed to continue. In addition, the vagueness of Delaware's statues, 13 Del. Code § 1103(4) and Del. Code § 1108, invites judges to inject their own biases into the decision-making process. See, e.g., In re New England Home for Little Wanderers, 367 Mass. 631, 328 N.E.2d 854 (1975) (parental rights terminated because mother took "unrealistic" approach to problems); In re Burell, 58 Ohio St. 2d 37, 388 N.E.2d 738 (1979) (per curiam) (removal of children threatened on the basis of standards similar to Delaware's when evidence demonstrated that mother lived with male companion); Painter v. Bannister, 258 Iowa 1390, 140 N.W.2d 152 (children removed because father was a "romantic dreamer" and lead a bohemian life style), cert denied, 385 U.S. 949 (1966).

One author suggests that termination standards like Delaware's should be discarded altogether. See, Wald, State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. 625 (1976); Wald, State Intervention on Behalf of Neglected Children: A Search for Realistic Standards, 27 Stan. L. Rev. 985 (1975). In their

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forget the memory of his parents. Even long after termination and placement in an adoptive home, children -- particularly older ones -- identify or may seek to identify with their natural parents.[12/] Significantly, studies show that a child's overall well-being is directly related to the ability to identify with natural parents over and above the ability to identify with foster or adoptive parents.[13/] Termination is additionally traumatic because children frequently view separation as punishment imposed for something they did wrong and about which they therefore feel guilty.[14/] Because state

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place Professor Wald suggests enacting consistent standards which would require the state, courts and child welfare personnel to show actual harm to the child at all stages of state intervention. Additionally, Professor Wald's proposal requires the use of maximum efforts to keep families together prior to removal through the delivery of protective services to the home.

12/ See, E. Weinstein, Self Image of the Foster Child, pp. 16-20 (1960).

13/ See, E. Weinstein, Self Image of the Foster Child, 15 (1960).

14/ See, J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child, 20 (1973).

intrusion introduces many new authority figures into a child's life, a child may experience conflicts of loyalty and anxiety about his or her future.[15] Ideally, of course, termination should result in the expeditious placement of children in stable, happy, permanent homes where their physical and emotional needs will be met. In fact, however, reality falls far short of that ideal.[16]

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[15] See, E. Weinstein, Self Image of the Foster Child, pp. 16-20 (1960).

[16]

> Frequently understaffed by inadequately trained personnel, applying outmoded concepts of child development and often rejecting social values dominant in the community, these [private and public] agencies operate almost totally independent of the courts in providing protective service for parents and in choosing an appropriate placement -- institutional, foster or adoptive -- for the child. . . . As a consequence, these agencies exercise almost unbridled discretion, and their decisions may or may not take into consideration those factors that should be relevant in child placement decisions. . . .

Sanford N. Katz, When Parents Fail, pp. 145-46 (Boston: Beacon Press, 1971). Numerous scholars have documented the harms that befall parents and children when the state intervenes. See, also, Mnookin, Foster Care - In Whose Best Interest, 43 Harv. Ed. Rev. 599 (1973); A.Gruber, Foster Home Care In Massachusetts: A Study of Foster Children, Their Biological and Foster Parents (1973).

When the trauma of permanent separation is aggravated by exposure to the harms and risks of foster care, a child stands little chance of growing up to be a healthy and productive human being. The most benevolently motivated termination decision may end one trauma but initiate many others. Because the rights implicated by termination are so fundamental, and its effects so far-reaching, the necessity for careful, precise, objective fact-finding cannot be overstated. A decision of this magnitude should plainly follow only the most exacting judicial scrutiny. To deny a child the most fundamental right and a fundamental relationship without due process of law, and to open the door to abuses that are all the more alarming because they are committed in the unreviewable discretion of the state -- and in the child's own name.

POINT II

FUNDAMENTAL FAIRNESS REQUIRES THE APPOINTMENT OF SEPARATE COUNSEL TO REPRESENT CHILDREN IN PROCEEDINGS WHICH MAY RESULT IN TERMINATION OF THEIR RIGHTS TO FAMILY INTEGRITY

This Court has repeatedly held the right to counsel to attach when a judicial proceeding brought by the state may result in a serious deprivation of liberty to a citizen. See, e.g., Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972); Scott v. Illinois, 440 U.S. 367 (19.9). The Court has, in addition, specifically held that minors as well as adults are entitled to the benefit of this right, and that it applies in nominally "civil" cases initiated by the state in the exercise of its parens patriae power just as it does in nominally "criminal" cases. In re Gault, 387 U.S. 1 (1967). Moreover, although In re Gault involved a delinquency proceeding rather than a parental neglect or termination proceeding, in the Gault opinion, the Court quoted with approval a New York statute providing children with "the assistance of counsel of their own choosing or of law

guardians in neglect proceedings." 387 U.S. at 40.

The specific holding of Gault is plainly applicable to this case. There the Court said:

> We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parenst must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.

387 U.S. 41. Gault involved "proceedings to determine delinquency," but Gault itself held that the name given by the state to a particular proceeding does not govern or define the constitutional rights implicated by the proceeding. Under the prior holdings of this Court, see Parham v. J.R., supra, the law of Delaware, and the law of numerous other states, the state acquires the unreviewable power to commit the child for whom it is the sole legal guardian to any number

of "institutions in which the juvenile's freedom is curtailed" -- such as mental institutions, hospitals, and possibly, as in Gault, "training schools" -- without ever having to appear before a court again. Thus, for the Roe children, the termination proceeding implicates, or may implicate,[17/] all of the same liberty interests as the delinquency proceedings at issue in Gault and, as demonstrated above, many additional liberty interests as well. See also Wisconsin v. Yoder, 406 U.S. 205, 243 (1972)(Douglas, J., dissenting in part).

It is precisely in recognition of such considerations that a study by the Institute of Judicial Administration/American Bar Association Joint Commission on Juvenile Justice Standards, Standards Relating to Abuse and Neglect, has proposed

> Appointment of counsel for child. Upon filing, the court should be required to appoint counsel at public expense to represent the child identified in the petition, as a party to the proceedings. . . ,

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17/ The record below, unreliable and underdeveloped as it is, still clearly suggests that at least one of the Roe children, Charles, may be retarded or handicapped.

and why the official Commentary on that provision explains

> There are good reasons to believe that this guarantee is constitutionally mandated in light of the significant consequences to the child if court wardship were ultimately imposed. . . . The reasoning underlying the Supreme Court's mandate of counsel for minors in In re Gault, 387 U.S. 1 (1967) thus applies readily to minors involved in wardship proceedings.

The necessity for requiring the appointment of counsel or of a law guardian in all termination and neglect proceedings as a matter of due process is well illustrated by the course of proceedings here. Delaware already has a local rule permitting the appointment of counsel to represent a child in the discretion of the trial court. Delaware Family Court Rule 360 provides that:

> The Court, at any stage of a proceeding, may appoint a guardian ad litem for a child if he has no parent or custodian appearing on his behalf, or the interests of the parent or custodian appear to conflict with those of the child.18/

18/ Despite this Court's clear holding in In re Gault, supra, that the Constitution requires the appointment of counsel in all delinquency proceedings, Del. Fam. Ct. R. 230 still provides that the right to counsel in such proceedings is also a matter of judicial discretion.

But as this Court said in Gault, "Nor can the judge represent the child," 387 U.S. 36, as this case amply demonstrates. Here, the trial judge, who had unilateral discretion under local law to consider and decide whether the children's interests required the appointment of counsel, initially neglected even to refer to -- let alone consider and evaluate -- those interests, even in this final and drastic context. And the trial judge's second opinion merely incanted the proper statutory language with no factual findings to support it and without hearing any evidence that could have supported any factual findings it might have made. In short, permitting the appointment of counsel for the child to rest in the discretion of the trial court often offers no protection for the child at all.

The record in this case thus once again juxtaposes the benevolent intentions of the Progressive era reformers who created modern family and juvenile court practice in this country with the institutional realities of twentieth century social welfare systems. Foster care, like the "training schools" at issue in Gault, is intended to benefit children, but in fact in many, many cases

it severely restricts personal liberty and has no "saving" or therapeutic effect at all. See Point IB, supra, and the authorities cited there. Because the interests of the children involved are so fundamental, and because, as this case illustrates, trial judges cannot be expected always to recognize potential conflicts of interest among the other parties' interests and those of the children, only an explicit holding that the Constitution mandates the separate representation of children in all termination proceedings will suffice to insure the protection of those interests.

The practical importance of separate counsel in trial court termination proceedings to the five children whose lives are at stake here is apparent from the record below. This is not a case in which the appointment of counsel would have been a hollow formalism. Separate representation may well have changed the outcome in this case. The failure of the lower courts to assure separate representation for these children is not only sufficient cause, by itself, for vacating the judgment below and remanding this case, but it has also led to other easily identifiable errors and omis-

sions which are, independently, of such separate constitutional magnitude as to require vacating the judgment below.

The most obvious of these other constitutional errors concerns the Delaware statutory requirement that the Court find that termination of parental rights be in the child's "best" interest. The Delaware statute requiring such a finding has not been challenged on grounds of vagueness either here or below, even though it is plainly no more certain in meaning than the "not fitted" element parent-appellants have chosen to attack on vagueness grounds.[19/]

19/ Indeed, the only provision of Delaware law that illuminates the legal meaning given by that state to the vague and ambiguous social work catchphrase "best interests of the child" in fact supports separate consideration of the individual child's desires and future prospects. Under a section of the Delaware Code having to do with private custody disputes, "best interests of the child" is defined to encompass,

> all relevant factors, including:
> (1) the wishes of the child's parent or parents as to his custody;
> (2) the wishes of the child as to his custodian;
> (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
> (4) the child's adjustment to his home, school, and community, and,

(fn. cont'd on next page)

In addition, appointment of separate counsel to represent the children would almost surely have avoided another fatal defect in these proceedings: the failure of any evidence to be adduced that would indicate that terminating parental rights would be "best" for them. The "best" interests standard is intrinsically comparative. The Oxford English Dictionary defines the word "best," for example, as "of the highest excellence; excelling all others in quality" (emphasis added). Webster's Seventh New Collegiate Dictionary defines "best" as "excelling all others." (emphasis added). Yet the lower court made no inquiry into the realistic alternative placements available for these children or any findings concerning

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(fn. cont'd from preceding page)

> (5) the mental and physical health of all individuals involved.

13 Del. Code § 722(a)(emphasis added). The Delaware Supreme Court has held this statute to require a "broad inquiry" into the child's situation in proceedings to terminate parental rights, Matter of Three Minor Children, 406 A.2d 14 (Del. Sup. Ct. 1979), an inquiry which was plainly not conducted here.

whether those alternatives were "better" than terminating parental rights -- let alone "best." These children's most basic constitutional and human rights were thus adjudicated without considering any evidence going to what the Delaware Supreme Court has itself denominated an "essential pre-requisite" for such an adjudication. Under the principles enunciated by this Court in Thompson v. Louisville, 362 U.S. 199 (1960) and reiterated in Vachon v. New Hampshire, 414 U.S 478 (1974), the Delaware judgment appealed from here was therefore rendered in violation of the due process clause because it is "based on a record lacking any relevant evidence as to a crucial element," Vachon v. New Hampshire, supra at 480, in a matter concerning the most fundamental of human rights.

As this case illustrates, the benevolent theories of parens patriae intervention in family life have long ago broken down in practice, and are vulnerable to constitutional attack on numerous grounds. See Developments in the Law -- The Constitution and the Family, supra at 1221-1242. Even if none of the grounds raised by parent-appellants suffices to vacate or reverse the judgment below, the lower courts' failure effectively to consider the children's

interests, or to see to it that those interests were independently developed or presented, requires vacating the judgment below. The primary due process interests at issue in this case have not even been raised or briefed. On this record, it would be fundamentally unfair for the Court to permit a final adjudication concerning those interests to stand.

CONCLUSION

For the reasons set forth above, this Court should vacate the judgment of the Court below and remand this case for further proceedings in which the children are represented by separate counsel.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5932

JOHN DOE AND JANE ROE, *Appellants,*

v.

STATE OF DELAWARE, *Appellee.*

On Appeal From The Supreme Court of Delaware

BRIEF OF AMICI CURIAE

American Orthopsychiatric Association, Association for Children of New Jersey, Child Welfare League of America, Inc., Children's Defense Fund, Institute for Child Advocacy, National Association of Social Workers, Inc., New York State Citizens' Coalition for Children, North American Council on Adoptable Children, Inc., Youth Policy and Law Center

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In re Anita "P.P."(N.Y. App. Div. 12/7/78) 3 Fam. L. Rep. (BNA) 2177 20

In re Christopher H., 577 P. 2d 1292 (Okla. 1978)..... 20

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In re Hirsch, 93 Misc. 2d 399, 402 N.Y.S. 2d 743 (Fam. Ct. 1980) 20

In re Ray M., 37 N.Y. 2d 619, 376 N.Y.S. 2d 431 (Ct. App. 1975) 20

In re Susan Lynn M., 53 Cal. App. 3d 311, 125 Cal. Rptr. 707 (1975)..... 20

In re Taylor, 334 N.E. 2d 194 (Ill. App. Ct. 1975)..... 20

In re W.M. III, 393 A. 2d 410 (Pa. 1978)..... 20

Jordan v. *DeGeorge*, 341 U.S. 223 (1951)..... 23

Kennedy v. *Mendoza-Martinez*, 273 U.S. 144 (1963) 23

King v. *Smith*, 392 U.S. 309 (1968) 32, 33

Mahoney v. *Arizona Department of Economic Security*, 24 Ariz. App. 534 (Ct. App. 1975)..... 20

McKeiver v. *Pennsylvania*, 403 U.S. 528 (1971)..... 33

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Moore v. *City of East Cleveland*, 431 U.S. 494 (1977)... 8, 9

Parham v. *J.R.*,_____U.S._____, 99 S. Ct. 2493 (1979) 12

Table of Authorities Continued

CASES: PAGE

Planned Parenthood v. *Danforth*, 428 U.S. 52 (1976) ... 12

Poe v. *Ullman*, 367 U.S. 497 (1961) ... 9

Quilloin v. *Walcott*, 434 U.S. 246 (1978) ... 10

Smith v. *Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977) ... 8, 11, 14, 17, 21, 26, 43

Stanley v. *Illinois*, 405 U.S. 645 (1972) ... 9, 10, 15, 24

State v. *Robert H.*, 393 A. 2d 1387 (N.H. 1978) ... 20

Wisconsin v. *Yoder*, 406 U.S. 205 (1972) ... 8

Zablocki v. *Redhail*, 434 U.S. 374 (1978) ... 8

MISCELLANEOUS:

Abbott, *The Child And The State* (1938) ... 11, 12

Advisory Committee on Child Development, *Toward A National Policy For Children And Families* (1976) ... 7

Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 Geo. L. Rev. 887 (1975) ... 11, 12, 31, 32, 34

Beck, *The White House Conference on Children: An Historical Perspective*, 43 Harv. Educ. Rev. 653 (1973) ... 11, 32

Billingsley and Giovannoni, *Children of the Storm: Black Children and American Child Welfare* (1972) ... 27

Boehn, *The Community and the Social Agency Define Neglect*, 43 Child Welfare 453 (1963) ... 27

Bowlby, *Child Care And The Growth Of Love*, (2d ed. 1965) ... 10

Bryce and Ehlert, *144 Foster Children*, 50 Child Welfare 499 (1971) ... 22

Buxbaum, *The Problem of Separation and the Feeling of Identity*, Child Welfare 8 (1955) ... 10, 21, 44

Table of Authorities Continued

MISCELLANEOUS: PAGE

Campbell, *The Neglected Child: His and His Family's Treatment Under Massachusetts Law and Practice and Their Rights Under the Due Process Clause,* 4 Suffolk L. Rev. 632 (1970) 25

Child Abandonment: The Botched Beginning of the Adoption Process, 60 Yale L. J. 1240 (1951) 30

Child Neglect: Due Process for the Parent, 70 Col. L. Rev. 465 (1970)..... 23, 33

Children's Defense Fund, *Children Without Homes: An Examination Of Public Responsibility To Children In Out-Of-Home Care* (1978) 18, 19, 21, 26, 30

Daly, *Termination of Parental Rights and the Void for Vagueness Doctrine: A Successful Attack on the Parens Patriae Rationale,* 16 J. Fam. L. 213 (1977-78) 23

Developments in the Law, The Constitution and the Family, 93 Harv. L. Rev. 450 (1980)..... 9, 23, 33

Fanshel and Shinn, *Children In Foster Care: A Longitudinal Investigation* (1978) 19, 22, 38, 42

Fox, *Juvenile Justice Reform: An Historical Perspective,* 22 Stan. L. Rev. 1187 (1970) 32

Geiser, *The Illusion Of Caring: Children In Foster Care* (1972) 10, 19, 21, 22, 44

Goldberg, *Legislative Guides for the Termination of Parental Rights and Responsibilities and the Adoption of Children* (Children's Bureau Publication No. 394, 1961) 14

Goldstein, *Medical Care for the Child at Risk: On State Supervision of Parental Autonomy,* 86 Yale L. J. 645 (1977) 35

Goldstein, Freud and Solnit, *Beyond The Best Interests Of The Child* (1973) 10, 11, 38, 43, 44

Governor's Advocacy Council on Children and Youth, *Why Can't I Have a Home? A Report on Foster Care and Adoption in North Carolina* (1978)..... 18, 21 25, 27

Table of Authorities Continued

MISCELLANEOUS: PAGE

Institute of Judicial Administration, American Bar Association, *Standards Relating To Abuse and Neglect* (Tentative Draft 1977) 38, 39, 43

Jeter, *Children, Problems and Services in Child Welfare Programs* (1963) 25

Joint Commission On Mental Health For Children, *Crisis In Child Mental Health: Challenge For The 1970's* (1969) 7

Jones, Newman and Shyne, *A Second Chance For Families: Evaluation Of A Program To Reduce Foster Care* (1974) 41

Kadushin, *Child Welfare Services* (3d ed. 1974) 21

Katz, Howe, McGrath, *Child Neglect Laws in America,* 9 Fam. L. Q. 1 (1975) 13, 14, 32

Keniston And The Carnegie Council On Children, *All Our Children: The American Family Under Pressure* (1977) 7, 27

Ketcham and Babcock, *Statutory Standards for the Involuntary Termination of Parental Rights,* 29 Rutgers L. Rev. 530 (1976) 43

Levine, *Caveat Parens: A Demystification of the Child Protection System,* 35 U. Pitt. L. Rev. 1 (1973) 26

Littner, *Some Traumatic Effects Of Separation And Placement* (1956) 10

Littner, *The Importance of the Natural Parents to the Child in Placement,* 54 Child Welfare (1975) 10

Maas & Engler, *Children In Need Of Parents* (1959) .. 20, 22

Masem, *Child Welfare in Arkansas* (1979) 27

Mnookin, *Child Custody Adjudications: Judicial Functions in the Face of Indeterminancy,* 39 Law & Contemp. Prob. 226 (1975) 20, 21, 23, 24, 26, 28, 34

Mnookin, *Foster Care—In Whose Best Interest?* 43 Harv. Ed. Rev. 599 (1973) 25, 28

Table of Authorities Continued

MISCELLANEOUS: PAGE

Model Adoption Legislation and Procedures Advisory Panel, *Model State Adoption Act and Model State Adoption Procedures,* 45 Fed. Reg. 10622 (1980) 37, 39, 40, 41, 43, 44

National Commission on Children in Need of Parents, *Who Knows? Who Cares? Forgotten Children In Foster Care* (1979)..... 12, 21, 25

Neglected Children Committee, National Council of Juvenile Court Judges, *Lincoln Model Statute for Termination of Parental Rights,* 27 Juvenile Justice 3 (1976)..... 38, 41, 43, 44

New Jersey State Legislature Office of Legislative Services, Division of Budget and Program Review, *Characteristics Of DYFS Children In Residential And Foster Care* (1979) 27

Note, *The Void for Vagueness Doctrine in the Supreme Court,* 109 U. Pa. L. Rev. 67 (1960) 23

Note, *Parens Patriae and Statutory Vagueness in the Juvenile Court,* 82 Yale L.J. 745 (1963) 33

Pike, *Permanent Planning for Foster Children: The Oregon Project,* 5 Children Today 22 (1976) 41

Platt, *The Child Savers* (1969)..... 26

President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime* (1967) 32

Richan, *Personnel Issues in Child Welfare, in Child Welfare Strategy in the Coming Years* (DHEW Publication No. OHDS 78-30158, 1978) 25

Shapiro, *Agencies and Foster Children* (1976) 42

Sherman, Newman and Shyne, *Children Adrift In Foster Care: A Study of Alternative Approaches* (1973) ... 40

Shyne and Schroeder, *National Study of Social Services to Children and Their Families* (1978) 24

Table of Authorities Continued

MISCELLANEOUS: PAGE

Task Panel on Mental Health and American Families, *Report of Sub-Task Panel on Infants, Children, and Adolescents,* in III *Task Panel Reports Submitted to the President's Commission on Mental Health* (1978) 10

tenBroek, *California's Dual System of Family Law: Its Origin, Development and Present Status, Part I,* 16 Stan. L. Rev. 257 (1969) 31

Thomas, *Child Abuse and Neglect, Part I: Historical Overview, Legal Matrix, and Social Perspectives,* 50 N.C.L. Rev 293 (1972) 11, 32, 33

United States Commission on the International Year of the Child, *Report to the President* (1980) 7

Vasaly, *Foster Care In Five States: A Synthesis And Analysis Of Studies From Arizona, California, Iowa, Massachusetts and Vermont* (1967) 18, 19 21, 22, 42

Wald, *State Intervention on Behalf of "Neglected" Children: A Search For Realistic Standards,* 27 Stan. L. Rev. 985 (1975) 26

Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal from Their Homes, Monitoring the Status of Children in Foster Care and Termination of Parental Rights,* 28 Stan. L. Rev. 623 (1976) 14, 20, 21, 23, 25, 26, 28, 33

White House Conference on the Care of Dependent Children, Letter to the President of the United States Embodying the Conclusions of the Conference on the Care of Dependent Children, *reprinted in The Proceedings Of The Conference On the Care of Dependent Children* (1909) 11

Wiltse and Gambrill, *Foster Care 1973: A Reappraisal,* 32 Public Welfare 7 (1974) 25

Table of Authorities Continued

CODES: PAGE

Ala. Code tit. 12 § 12-15-71 (1975) 28

Alaska Stat. § 47.10.080(c)(1979) 28

Ark. Stat. Ann. § 56-220 (Supp. 1979) 15

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Del. Code tit. 10 § 902 (1974) 32

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Del. Code tit. 31 § 301 (1974) 31

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S.C. Code § 20-11-20(2)(a) (1976)	29
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IN THE

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OCTOBER TERM, 1979

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JOHN DOE AND JANE ROE, *Appellants,*

v.

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On Appeal From The Supreme Court of Delaware

BRIEF OF AMICI CURIAE

American Orthopsychiatric Association, Association for Children of New Jersey, Child Welfare League of America, Inc., Children's Defense Fund, Institute for Child Advocacy, National Association of Social Workers, Inc., New York State Citizens' Coalition for Children, North American Council on Adoptable Children, Inc., Youth Policy and Law Center

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INTEREST OF AMICI CURIAE

This brief is filed on behalf of the American Orthosychiatric Association, Association for Children of New Jersey, Child Welfare League of America, Inc., Children's Defense Fund, Institute for Child Advocacy, National Association of Social Workers, Inc., New York State Citizens' Coalition for Children, North American

Council on Adoptable Children, Inc., and the Youth Policy and Law Center.*

---

* (1) The American Orthopsychiatric Association is a national professional membership educational organization with over 8,000 members that brings together leading professionals in the disciplines devoted to mental health and the study of human behavior.

(2) The Association for Children of New Jersey is a nonprofit citizen organization which works to improve programs and policies affecting children in New Jersey through research, community education, and legislative and administrative advocacy.

(3) The Child Welfare League of America, Inc. is a national voluntary standard-setting organization with over 400 local affiliates, many of which are involved in providing services to children and their families, including foster care and adoption services.

(4) The Children's Defense Fund is a national nonprofit, public interest organization which has gathered evidence about the problems facing children at risk of or in out-of-home care in this country and is attempting to address these problems systematically, through litigation, legislation, and work with local and state organizations.

(5) The Institute for Child Advocacy, a citizen-based public interest organization, works primarily in Ohio to improve the systems that serve children, particularly those in foster care, by impacting on public policy through citizen organizing, administrative negotiation, legislation and litigation.

(6) The National Association of Social Workers, Inc. is the largest professional association of social workers in the world, comprised of 81,000 social workers with chapters in all fifty states and the District of Columbia.

(7) The New York State Citizens' Coalition for Children is comprised of approximately 45 foster parent and adoptive parent organizations throughout New York State.

(8) The North American Council on Adoptable Children, Inc. is a national organization representing over 250 adoptive parent groups who are united in the belief that every child has a right to a permanent family.

(9) The Youth Policy and Law Center, Inc., is a private nonprofit public interest organization in Wisconsin advocating simultaneously in the legislative, judicial and administrative branches of government for the rights of youth.

Amici share a deep conviction that the family must be preserved as the fundamental social unit in our society. In cases where children must be removed from their families, *Amici* believe that every reasonable effort should be made to make it possible for the child to be returned to his or her natural parents. Where return to the parents is not possible, we believe that each child is entitled to a permanent family, preferably through adoption.

Amici represent a vast range of professionals and agencies involved in meeting the needs of families and children in difficulty, as well as organizations of parents and others advocating on behalf of children who too frequently are removed from their homes inappropriately and left indefinitely in care, with little chance of permanence or security.

Amici submit this brief in order to inform the Court of the important consequences of this case for children in this country, many of whom are now being denied their fundamental right to permanence and family integrity by being left to linger in foster care, neither returned to their families nor provided new permanent families through adoption.

SUMMARY OF ARGUMENT

The Court in this case is faced with problems in the delicate and complicated area of state intervention into family life. We have filed this brief in order to present a point of view which is not fully represented by the parties to this case. We are concerned both that families are broken up and parental rights terminated for the wrong reasons and also that parental rights are not being terminated when children need to be freed from legal ties and provided new permanent families through

adoption. We are concerned with the harm to children in both situations.

Our concerns lead us to ask the Court to do three things: 1) to confirm that the children's interests at stake here are interests in permanent and continuous family relationships and that those interests are violated by state action which unnecessarily destroys either the permanence or continuity of these relationships; 2) to declare the Delaware termination of parental rights statute void for vagueness because its vague standards increase the probability that decisions to terminate or not terminate will harm children; and 3) to give guidance as to what are proper considerations to those who must design constitutionally adequate standards for termination of parental rights.

I.

1. The interests of children at stake when a state removes them from their family are substantial. There is universal agreement in the jurisprudence of this Court, the country's political traditions and scientific knowledge that children need a permanent and continuous relationship in a family, natural or adoptive, and are harmed by separation from the family. Protection of family ties flows in part from this recognition of children's needs. In addition, the country's commitment to family life flows from the recognition that state care throughout the years has proven to be harmful to children.

2. State statutes authorize the removal of "neglected" children from their families for indefinite periods of time or permanently. The stated purpose of state intervention into families is to strengthen families and to break them up only when the interests of the

child demand it. However, each time the state removes children from the physical custody of their parents, their interests in permanent and continuous relationships are threatened and they are subjected to the risks involved in state care. As the interests in family relationships are substantial, permanent removal of the child from the family through termination of parental rights should not occur unless there are compelling interests to justify it. We stress the crucial role of termination as an integral part of the entire foster care process because this Court's characterization of the interests at stake here will have a significant impact on all children at all stages of the child welfare system.

II.

1. Termination of parental rights is one measure a state may take to protect children. It is intended to insure that there is a potential exit from the impermanency of foster care when a child cannot be returned home. Termination proceedings have failed to perform this function. Terminations of parental rights are occurring inappropriately with no or little consideration of the needs of children and without efforts to keep families together. In addition, terminations are not occurring when the interests of the child in a permanent family demand them.

2. Vague statutes contribute significantly to the failure of termination proceedings to serve their function. They violate several basic principles of due process by delegating basic policy matters to state officials with no guidance to ensure appropriate decision-making, by encouraging arbitrary and discriminatory decision-making, by providing little opportunity for review of crucial decisions and by increasing the risks of harmful

decisions in an area where there is substantial likelihood of inappropriate decision-making.

2. Vague standards like "not fitted to continue to exercise parental rights" reflect outdated notions of the needs of children and do not serve current national goals. They were not developed to ensure the protection of family integrity nor to protect children from the harms of separation or of state care. As in the juvenile delinquency area, unbridled discretion has led not to individualized decision-making carefully adjusted to the needs of each child, but rather to the ignoring of their needs and harm to children. The "best interests of the child" standard was also not developed to ensure family integrity but was designed to be used when a family member, not the state, sought to destroy the family unit.

III.

The elimination of vague standards will not alone protect the due process rights of children in their familial relationships unless they are replaced by specific standards which focus on the child. The fundamental interests of children require that the harms of separation and state care as compared to the harms of remaining with the family be considered when children are removed from their families.

Specific standards which focus on the child rather than on parental conduct alone can be drafted. There exists a great deal of scientific knowledge which can guide and has guided both legislators in amending statutes and several eminent bodies in drafting model codes which contain constitutionally adequate standards.

ARGUMENT

I. Children's Fundamental Rights To Continuous And Permanent Family Relationships Are Violated By State Action Which Unnecessarily Destroys Those Relationships.

There is virtually universal agreement that families are vital to the healthy development of children. Children need to feel wanted and accepted; they need continuity in their relationships with their biological or psychological parents; they need a permanent relationship to give them a sense there is a regular, dependable quality to the world.[1]

The jurisprudence of this Court and this country's political traditions, as well as scientific knowledge, support the fundamental nature of children's interest in their continuous relationship in a family. Faced with state interference into familial relationships this Court has reviewed such activities with great concern, acknowledging the severe harm to each family member caused by state intervention.

All states have laws governing the protection of neglected children, which authorize the state to remove children from their families and to terminate familial rights. Because of the fundamental nature of children's interest in a permanent and continuous family relationship and the harm to them which accompanies breaking up of the family unit, decisions to remove children from their parents are ones involving "issues of unusual

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[1] *See* Advisory Committee on Child Development, *Toward a National Policy for Children and Families* (1976); Joint Commission on Mental Health for Children, *Crisis in Child Mental Health: Challenge for the 1970's* (1969); Keniston and The Carnegie Council on Children, *All Our Children: The American Family Under Pressure* (1977); and U.S. National Commission on the International Year of the Child, *Report to the President* (1980).

delicacy," *Smith* v. *Organization of Foster Families for Equality and Reform,* 431 U.S. 816, 855 (1977), which require careful balancing of the interests of each family member and an understanding of how state decisions affect families.

Because we are concerned with the whole process of state intervention and the role of termination in it, we urge this Court to carefully characterize the interests of the child affected when the state intervenes into a family. The child's fundamental right to permanency and continuity in family relationships is threatened by termination of parental rights not only because termination involves the permanent severing of the legal relationship between child and parent, but also because it makes permanent the removal of the child from the physical custody of the parent. This careful characterization is necessary not only to an analysis of the constitutional standards for termination but also because of its impact on the standards for initial removal from the home and for indefinite maintenance of a child in the limbo of foster care.

A. Children have a fundamental interest in the continuity and permanence of family relationships.

This Court has had several occasions to note that the primacy "of parents in the upbringing of their children is now established beyond debate as an enduring American tradition," *Wisconsin* v. *Yoder,* 406 U.S. 205, 232 (1972), and has stressed the "sacred" nature of family ties, *Griswold* v. *Connecticut,* 381 U.S. 479, 486 (1965); the warm affectional ties, *Zablocki* v. *Redhail,* 434 U.S. 374, 384 (1978); the mutual sustenance and security in family life, *Moore* v. *City of East Cleveland,*

431 U.S. 494, 505 (1977) (plurality opinion).[2] Although the Court has spoken of the interest in family integrity, it has recognized that each family member, the child as well as the parent, has an individual interest in being part of a family.[3] The children's interest is in the permanency and continuity of the relationships that they enjoy as members of a family, relationships which are essential to their healthy development. Thus, this Court has recognized that the deference due family ties flows from the recognition that the state, as an "impersonal political institution is not competent to provide the intimacy, stability and emotional support necessary for a child's development," *Belotti* v. *Baird,* _____ U.S. _____, 99 S. Ct. 3035, 3045 (1979)(opinion of Powell, J.)[4] and has afforded great protection to existing family units.[5]

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[2] The Court has based its protection of the family on several constitutional provisions: "The home derives its preeminance as the seat of family life and the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted constitutional right." *Poe* v. *Ullman,* 367 U.S. 497, 551-52 (1961) (Harlan, dissenting). Recent commentary argues that this Court's cases have established the due process clauses as the bases for special protection of "family" rights from state interference, Note, *Developments in the Law—The Constitution and the Family,* 93 Harv. L. Rev. 1156, 1166-68 (1980).

[3] Thus in *Caban* v. *Mohammed,* 441 U.S. 380 (1979), the Court recognized that the children had individual interests in being completely incorporated into a family unit, interests which might be distinct from those of their father or mother.

[4] "[The deference due familial ties has also] arisen from our historical commitment to diversity of views and lifestyles," *Moore,* 431 U.S. at 503-04.

[5] Where the Court has been presented with an *existing* parent-child relationship in which the father has "sired and raised" his children as in *Stanley* v. *Illinois,* 405 U.S. 645, 651 (1972), or has had a "substantial relationship with them," *Caban,* 441 U.S. 380, _____, 99 S. Ct. at 1969, it has granted the protection for the rela-

The Court's evaluation of the importance for children of preserving the continuity of family ties has been confirmed by psychological and sociological knowledge[6] which emphasizes the severe harm to the child caused by separation from the family.[7] Even where children have been removed from inadequate homes, separation from parents is extremely painful to the

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tionship sought. In *Stanley* the Court held the state must accord a father a hearing before removing his illegitimate children from his home. In *Caban* the Court invalidated a statute which required the consent of mothers but not of fathers before their illegitimate children could be adopted.

However, in *Quilloin* v. *Walcott,* 434 U.S. 246 (1978), where the Court viewed the parent-child relationship as one in which the father "never exercised actual or legal custody," 434 U.S. at 255, the Court refused to recognize his right to "veto" the adoption of his child by the mother's new husband and to stop the legal recognition of "a family unit already in existence." *Id.* at 255.

The custody disputes presented in *Caban* and *Quilloin* differ substantially from that presented here. In those cases some continuity of family relationships was to be preserved for the child as one natural parent would have custody of and legal ties to the child whatever the outcome. Here, as in *Stanley,* the children's family has been broken up by the state which is challenging the parents' right to custody.

[6] The child's need for continuity and a sense of belonging has recently been reiterated. Goldstein, Freud and Solnit, *Beyond the Best Interests of the Child* 31-34 (1973); Task Panel on Mental Health and American Families, *Report of the Sub-Task Panel on Infants, Children, and Adolescents,* in III *Task Panel Reports Submitted to the President's Commission on Mental Health* 26-27 (1978).

[7] The severe psychological harm of separation from the family is well documented. Bowlby, *Child Care and the Growth of Love* 13-20 (2d ed. 1965); Buxbaum, *The Problem of Separation and the Feeling of Identity,* Child Welfare 8 (1955); Geiser, *The Illusion of Caring: Children in Foster Care* 35-129 (1972); Goldstein, Freud and Solnit, *supra* note 6, at 19-20; Littner, *The Importance of the Natural Parents to the Child in Placement,* 54 Child Welfare 175 (1975); Littner, *Some Traumatic Effects of Separation and Placement* (1956).

child. *OFFER*, 431 U.S. at 837. Children need to be returned to permanent family relationships either with their natural parents or, if that is not possible, with adoptive parents without delay. Goldstein, Freud & Solnit, *supra* note 6, at 20.

With regularity in the last century, this country has reaffirmed its commitment to preserving family life as "the highest and finest product of civilization," and the need to keep children "as a general rule" with their parents. Letter from White House Conference on the Care of Dependent Children to the President of the United States Embodying the Conclusions of the Conference on the Care of Dependent Children, *reprinted in Proceedings of the Conference on the Care of Dependent Children* 192-94 (1909).[8] The reaffirmance of the national commitment has been prompted in part by continuous evidence of the state's inability to improve the lot of most children by removing them from their homes. Since the state began intervening in families there has been criticism of its care of its wards.[9]

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[8] The first White House Conference on Children was held in 1909. Since then conferences are held every decade and the commitment to the family reiterated. Beck, *The White House Conference on Children: An Historical Perspective*, 43 Harv. Educ. Rev. 653, 657-68 (1973).

[9] In the colonies, children removed from their parents by the state were "indentured" for work or training. An indenture was a contract which created the terms of the placement. Thomas, *Child Abuse and Neglect, Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C.L. Rev. 293, 301; Areen, *Intevention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 Geo. L. Rev. 887, 899 (1975). This system was widely criticized. New Jersey Pension Survey Commission, *State Care of Dependent Children in New Jersey, Report No. 5*, 9-10, and U.S. Children's Bureau, *Children Indentured by the Wisconsin State Public School* (1925), *excerpted in* 1 Abbott, *The Child and the State* 223-29 (1938).

Criticism of state care continues today. National Commission on Children in Need of Parents, *Who Knows? Who Cares? Forgotten Children in Foster Care* (1979) [hereinafter cited as National Commission].

B. Unnecessary removal from a permanent family violates children's rights.

In stressing the fundamental importance to the child of permanence and continuity in familial ties and the extreme harm that occurs to children when separated from their parents, we are not negating the necessity for state intervention when the parent-child relationship is harmful to the child. The interest and needs of the child may not always coincide with the interest and needs of the parent.[10] All states have statutes authorizing state action to protect children variously described as neglected, in need of assistance and dependent.[11] These statutes pro-

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A reform of the nineteenth century was the establishment of poor houses or alms houses to which children were sent along with "insane, indecent, and idiotic adults." Letchworth, *Report on Paupers and Destitute Children* in 2 Abbott, *The Child and the State* 68-71 (1938). These institutions soon received widespread criticism for the poor care of children. The latter half of the nineteenth century saw the creation of separate institutions for children which at their inception were recognized as offering inadequate care. In the nineteenth century, some states turned to foster care as an alternative to institutional care. But whatever the system, all states had difficulty insuring adequate care. Areen, *supra* note 9, at 905-08.

[10] This Court has recognized extreme situations where the interest of the child may conflict with the maintenance of the integrity of the family unit. A minor's pregnancy may "fracture" the family structure, *Planned Parenthood* v. *Danforth,* 428 U.S. 56, 75 (1976); a parent may seek to institutionalize his child because of family conflicts, *Parham* v. *J.R.*, _____ U.S. _____, 99 S. Ct. 2493, 2509 (1979).

[11] A typical statutory definition of "neglected child" is a person under 18 years of age, abandoned, and/or lacking proper parental care, control or guardianship, and whose parent, guardian or custo-

vide for an array of protective measures that may be taken on a child's behalf, including termination of parental rights, the permanent removal of the child from the home.

However, the stated purpose and theory of state intervention into the family is declared by all states to be the strengthening of families; families are to be broken up only when the child's interest cannot be safeguarded without removal.[12] State statutory schemes place responsibilities for intervention in a state agency which is to investigate any complaint of child neglect. In many states the agency is authorized to seek a voluntary arrangement with the parent whereby services are provided to the family or to petition a court for authority to act. Del. Code tit. 10 § 933 (Supp. 1978). The agency may remove the child from the home on an emergency basis pending the adjudication. Following a hearing and an

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dian refused or was unable to provide necessary medical, surgical or other special care made necessary by the child's particular condition. A "dependent" child and a child "in need of assistance" are defined similarly. Katz, Howe, McGrath, *Child Neglect Laws in America*, 9 Fam. L.Q. 1, 70 (1975). Throughout this brief, "neglected" and "neglect" shall be used.

[12] In an article summarizing and digesting neglect statutes, commentators have described a "typical" child neglect statute as containing a purpose clause stating that the intent of the law is to be liberally construed: "to secure care, guidance and discipline for each child, preferably in his own home; to preserve and strengthen family ties whenever possible, removing him from the care, custody and discipline of his parents, only when his welfare or safety and the protection of the public cannot be adequately safeguarded without removal; and when removed, to secure care, custody and discipline as nearly as possible equivalent to that which should have been given by his parents." Katz, *supra* note 11, at 70.

adjudication of neglect, the court may make either of two types of dispositions of a case if the allegations are proven: protective supervision by the court in the child's own home with specified services to be provided; or placement of the child outside the home and transfer of legal custody to a public agency or other persons. Del. Code tit. 10 § 937 (Supp. 1978). *See generally* Wald, *State Intervention on Behalf of 'Neglected' Children: Standards for Removal from their Homes, Monitoring the Status of Children in Foster Care and Termination of Parental Rights,* 28 Stan. L. Rev. 623, 629-630 (1976) [hereinafter cited as Wald I].

Children who are removed from their families are placed by the state in foster homes or in institutions for care. Such placements are intended to be *temporary* and transitional until the child can be returned to a permanent setting either by return home or integration into an adoptive home. *OFFER,* 431 U.S. at 824-25, 833. Termination of parental rights causes the permanent removal of the child from the parents and the severing of all legal ties. [13] It is designed to make full integration into a new family possible through adoption by the severance of old legal ties.[14] However, termination of

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[13] A "typical" definition of termination is: "the permanent elimination by court order of all parental rights and duties, including residual parental rights and responsibilities." Colo. Rev. Stat. Ann. § 22-1-8 (1973). Katz, *supra* note 11, at 55.

[14] Termination statutes were designed to correct perceived problems in the adoption process: the provisions on who had to consent to adoption were unclear, leading to natural parent challenges to adoption; the tendency to compare the natural parents with the proposed adoptive parents in the adoption proceeding was considered unfair to the natural parents; and adopting parents often desired to maintain confidentiality. Goldberg, *Legislative Guides for the Termination of Parental Rights and Responsibilities and the Adoption of Children,* (Children's Bureau Publication No. 394 1961).

parental rights can occur in many states before there are potential parents who wish to adopt the child.[15] Thus, termination is not the last step of the process. After termination, an adoptive family must be found for the child.

Decisions to terminate or not to terminate implicate children's fundamental interests in continuous and permanent family relationships, relationships which are essential to their healthy development. This is true not only because legal ties are broken, but also because decisions to separate children from their parents, whether for permanent or indefinite periods of time, destroy the continuity and permanence of their relationships and may cause serious harm to children.

As the interests of the child and parents in the maintenance and continuity of their relationship are "substantial," *Stanley* v. *Illinois,* 405 U.S. 645, 652 (1972), and "absent a powerful countervailing interest," warrant protection, *id.* at 651, each time a state removes children from their parents permanently or indefinitely destroying the continuity of their relationships and subjecting them to harms of separation and of state care, there must be a compelling interest requiring removal. When the purpose of the state in removing children is to protect them from harm, it should not remove unless

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[15] Only seven states provide for termination solely in the context of an adoption proceeding: Arkansas, Ark. Stat. Ann. § 56-220 (Supp. 1979); California, Cal. Civ. Code §§ 232(a)(2), (7) (West Supp. 1979); New Mexico, N.M. Stat. Ann. § 40-7-4-B(4) (Supp. 1979); Pennsylvania, Pa. Stat. Ann. tit. 1 § 311 (Purdon Supp. 1977); Illinois, Ill. Rev. Stat. ch. 37 § 705-9(3), ch. 40 § 9.1-1(D)(m) (West 1975, Supp. 1979); Massachusetts, Mass. Gen. Laws Ann. ch. 210 § 3(a)(ii), 210 § 3(b) (West Supp. 1979); Rhode Island, R.I. Gen. Laws § 40-12-15 (1977).

the children are subjected to greater harm in the home than they suffer by separation and state care.

Because of the interrelation of neglect and termination standards and proceedings, see note 42 at p.28 *infra,* the Court's characterization of the interests at stake here will affect the probability of whether children's rights are violated at the initial removal as well as the termination stage. That is, no matter what the Court does in this case it will have a far-reaching impact on the entire foster care process. Thus, much will be done to protect children if the Court, in reaffirming the nation's commitment to the family and the need for "powerful" state interests to justify state intervention, makes it clear that removal of a child from the home for indefinite periods, as well as permanently, seriously implicates fundamental interests of the child. Such a ruling will help correct the current failure of termination proceedings to accomplish their function, which we discuss next in this brief, and will protect many children from inappropriate removal from their families. Children will be thus saved from the intolerable state of limbo in which the state does not return them home but does not have grounds to seek to terminate parental rights so as to provide new permanent families through adoption.

II. Vague Standards Increase The Likelihood That Termination Proceedings Will Not Protect Children.

Termination proceedings have not accomplished the function for which they were developed: to conclude the temporary status of the child when return to the home would be harmful and integration into another permanent family through adoption is to be encouraged. In-

stead, parental rights are being terminated inappropriately without attention to the needs of the child and the harm to children of termination, and with few efforts first to avoid removal or to reunite the family after removal. At the same time, in other cases termination proceedings are not occurring when the children's needs demand them. There is a great deal of empirical evidence of these failures. Thus, as this Court has had recent occasion to note, the result of neglect intervention is a system widely condemned by commentators for causing great harm to children. *OFFER,* 431 U.S. at 833-83.

Because of several basic offenses to the principles of due process, vague standards increase the likelihood of inappropriate terminations of parental rights which violate family members' rights to the integrity of their unit and cause serious harm to children. Also, they discourage termination of parental rights in situations in which the child is thereby caused further harm by being left in the impermanence of foster care.

The "historical credentials" of termination of parental rights standards, which provide only "parental unfitness" and "best interests of the child" as standards, like the "parens patriae" justification for exclusion of juveniles from constitutional protections rejected by the Court in *In re Gault,* 387 U.S. 1 (1967), are "of dubious relevance" and their interpretation is likewise "murky." *Id.* at 16. The "murkiness" of standards such as "not fit to exercise parental rights" and "best interests of the child" results in part from their historical credentials: they were developed not to insure the safeguarding of family autonomy and integrity, the purported present purpose of their use, but to further other state goals which have since been rejected by

courts and legislatures or which have never been applicable to termination decisions.

A. Termination has not served its function in protecting children from harm.

1. *Parental rights are being terminated inappropriately when there have been few efforts to avoid removal or to reunite the family.*

Rather than there being protection of children's and parents' interests in the continuity and permanence of the family unit with removal from the home only when, and only for as long as, necessary to protect the child, families are being broken up unnecessarily and children subjected to the harms of state care. Although removal is only one of many alternatives available, neglect hearings commonly result in removal rather than protective supervision in the home.[16] Once children are removed, services which could help reunite the family are rarely offered.[17] In fact, agency policies often discourage

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[16] Studies have shown the high incidence of removal as the disposition at neglect proceedings. One commentator has suggested 50% of such proceedings end with removal. Wald I, *supra* at 626 n.4. Unnecessary removals occur because services which could prevent the need for placement (day care or homemaker services, or treatment programs for handicapped children) do not exist or exist but are not used effectively. Children's Defense Fund, *Children Without Homes: An Examination of Public Responsibility to Children in Out-of-Home Care* 15-21 (1978) [hereinafter cited as Children's Defense Fund]; Vasaly, *Foster Care in Five States: A Synthesis and Analysis of Studies from Arizona, California, Iowa, Massachusetts and Vermont* 24-27(1967).

[17] Natural parents are typically not offered rehabilitative services after the children are removed. For example, a North Carolina study reported that 59% of the natural parents surveyed said they received no services after their child was placed in foster care. Governor's Advocacy Council on Children and Youth, *Why Can't I*

reunification. For example, little effort is made to facilitate parental visiting, although visitation is a significant predictor of the likelihood that a child will be able to return home and is extremely significant in resolving the identity conflicts arising for children from separation.[18] In addition, parents are sometimes denied information about their children in placement. They may not even be notified when their children are transferred from one placement to another.[19] Deprived of contact with each other and of services to reunify them, families are broken up. Parental rights are then

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Have a Home? A Report on Foster Care and Adoption in North Carolina 48-49 (1978). A survey of a random sample of 160 natural parents of children in foster care in Massachusetts in 1971 revealed too that there had been little service provided the families since the child's removal, although only 17% of the parents indicated they did not intend to take the child back, and over 40% indicated their family situation had not changed or had deteriorated since the child's removal. An Arizona study similarly reported that 56% of the mothers of children in care were not offered services during placement. Vasaly, *supra* note 16, at 34-35.

[18] In a five-year longitudinal study of children in foster care in New York City, patterns of parental visiting proved to be the best indicator of whether the children returned home. Sixty-six percent of the children who received no visiting during the first year in care were still in care five years later. In contrast, only 27% of the children whose parents visited on all occasions permitted by the agency were still in care at the end of five years. Fanshel and Shinn, *Children in Foster Care: A Longitudinal Investigation* 93-98 (1978). A study of over 5,000 children in Iowa reported similar positive correlations between continuing meaningful parental contact with the child and the likelihood of the child's return home. Vasaly, *supra* note 16, at 63. Other studies have documented the importance of visiting to identity formation. Geiser, *The Illusion of Caring: Children in Foster Care* 68-80 (1973); Weinstein, *The Self-Image of the Foster Child* 17 (1960). Yet, in spite of the significance of parental visiting for children, agency policies typically do not encourage parental visiting. Rather, policies which do exist are often restrictive, thus discouraging visits. Children's Defense Fund, *supra* note 16, at 22-23.

[19] Children's Defense Fund, *supra* note 16, at 23-24.

terminated inappropriately when the child might have been able to be returned home.

2. *Parental rights are not being terminated when there is little possibility that the parent-child ties can be re-established without harm to the child.*

Some judges faced with the failure on the part of state agencies to provide services and facilitate reunification are reluctant to terminate parental rights even when they do not think a child can be returned home.[20] Judges may deny termination petitions but then refuse to order the child returned home.[21] Social workers too often do not seek termination of parental rights even

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[20] In at least seven jurisdictions, courts have denied termination of parental rights where the service agency has either failed to provide services aimed at reunification or has provided inadequate or misleading information about parental responsibilities, parental access to children, services available or agency concerns. *In re Taylor,* 334 N.E.2d 194 (Ill. App. Ct. 1975); *Mahoney* v. *Arizona Department of Economic Security,* 24 Ariz. App. 534, 540 P.2d 153 (Ct. App. 1975); *In re Christopher H.,* 577 P.2d 1292 (Okla. 1978), *concurring opinion* at 580 P.2d 143; *C.S.* v. *Smith,* 483 S.W.2d 790 (Mo. Ct. App. 1972); *In re Susan Lynn M.,* 125 Cal. Rptr. 707, 53 Cal. App. 3d 311 (Ct. App. 1975); *State* v. *Robert H.,* 393 A.2d 1387 (N.H. 1978); *In re Anita "P.P."* (N.Y. App. Div. 12/7/78) 3 Fam. L. Rep. (BNA) 2177. *But see In re W.M. III,* 393 A.2d 410 (Pa. 1978) (agency services desirable but not mandated by state law); *In re Hirsch,* 402 N.Y.S.2d 743, 93 Misc. 2d 399 (Fam. Ct. 1978) (extraordinary circumstances of child may relieve agency of responsibility for making "diligent efforts"); *Matter of Ray M.,* 376 N.Y.S.2d 431, 37 N.Y. 2d 619 (Ct. App. 1975) (agency need not make "diligent efforts" if they are against child's best interests).

[21] Many observers have noted that even though many judges do not terminate they still may not return the child to the parents. Wald I, *supra* at 689; Mnookin, *Child Custody Adjudications: Judicial Functions in the Face of Indeterminancy,* 39 Law & Contemp Prob. 226, 273 (1975) [hereinafter cited as Mnookin I]; Maas & Engler, *Children in Need of Parents* 390-91 (1959).

when there has been no contact between child and parents for long periods. In fact for too many neglected children in state care, there is little chance for return home or for termination of parental rights and adoption.[22]

Children removed pursuant to neglect proceedings remain in foster care for long periods of time — on an average of five years — without any permanent family.[23] While in care for long periods, children are frequently subjected to multiple changes in placements, repeatedly moved from one foster home or institution to another, at extreme psychological cost.[24] Generally the probabili-

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[22] In some states like North Carolina, the number of children expected to return home is limited (about 20% of the cases), but at the same time the effort to terminate parental rights and free children for adoption is a slow process. At the time of the state study of foster care, over 300 children were awaiting termination. Governor's Advocacy Council on Children and Youth, *supra* note 17, 62-67. Studies in other states show similar patterns. Vasaly, *supra* note 16, at 68-74. *See* Wald I, *supra* at 632. Many commentators also agree that few terminations occur: Wald I, *supra* at 635 n.59; Mnookin I, *supra* note 21, at 217 n.39. We show below some of the reasons for this reluctance to terminate. See pp. 25, 28-30 *infra*.

[23] This Court has already seen evidence that children stay in foster care for much longer than contemplated by the theory of the system: "The District Court found as a fact that the median time spent in foster care in New York was over four years." *OFFER*, 431 U.S. at 835. In Delaware, the average child spends seven years in care. National Commission, *supra* at 23-33.

[24] The record in *OFFER* showed that nearly 60% of the children in foster care in New York City had experienced more than one placement, and about 28% had experienced three or more. *Id.*, 431 U.S. at 837. Data from studies of foster care in Arizona, California, Iowa and Massachusetts, as well as from two national studies have revealed similar placement patterns. Vasaly, *supra* note 16, at 55-57; Children's Defense Fund, *supra* note 16, at 40-41; National Commission, *supra* at 32-33. The psychological damage done to children by repeated moves has been well documented. Buxbaum, *supra* note 7, at 13-14; Geiser, *supra* note 17, at 88-90; Kadushin, *Child Welfare Services* 445 (3d ed. 1974).

ty of a child's returning home or being adopted decrease rapidly after a child has been in care for over two years.[25] This impermanence of foster care is extremely harmful to a child.[26]

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As all the facts are not known in this case, we do not know if the decision to terminate met the needs of Bill, Amy, Charles, Ellen and David. As the record below was sealed, we do not know if there was sufficient evidence for a correct decision to be made. It is impossible to determine this from the decisions below as they do not discuss the possibility of returning the children home but focus on the parents' conduct and their relationship to each other. The decisions below do not indicate whether the parental conduct harmed the children or whether the conduct, if harmful, caused more harm than separation from the parents.[27] The decision to terminate in this case, like so many other termination decisions, does not reflect consideration of the harms to children that are caused by termination.

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[25] *See* Fanshel and Shinn, *supra* note 18, at 120-21; Maas and Engler, *supra* note 21, at 421; Vasaly, *supra* note 16, at 54.

[26] In a study of 144 children in foster care, Bryce and Ehlert concluded: "It is our conviction that no child can grow emotionally while in limbo, never really belonging to anyone except on a temporary and ill-defined or partial basis. He cannot invest except in a minimal way (just enough to survive) if tomorrow the relationship may be severed . . . to grow the child needs at least the promise of permanency in relationships and some continuity of environment." Bryce and Ehlert, *144 Foster Children,* 50 Child Welfare 499 (1971). *See* Geiser, *supra* note 18, at 35-129.

[27] Therefore, we are unable to take a position on the current disposition for the children in this case if the Court declares the termination statute to have violated the parents' constitutional rights and reverses the decision of the Supreme Court of Delaware. At that point it would be necessary for the Superior Court to hold a hearing, hear new evidence on the status of the children and their parents and make a determination in accord with the principles that this Court will enunciate.

B. Vague statutes do not protect children from harm.

Vague statutes contribute significantly both to the likelihood of inappropriate terminations of parental rights without consideration of the children's needs and to the likelihood of the failure to terminate when the child's interests would be served. Vague termination statutes[28] violate several basic principles of due process:[29] they delegate basic policy matters to state officials, they encourage discriminatory decision-making, they provide little opportunity for judicial review, and they increase the risks of harmful decisions.

1. Vague statutes allow social workers and judges to resolve sensitive questions regarding family life on the basis of personal values as to appropriate child rearing techniques, an area in which there is little agreement. The terms themselves do not offer guidance to social workers and judges as to what factors they should con-

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[28] There has been widespread criticism of the common use of vague language in neglect and termination statutes. Wald I, *supra* at 629, 639-41; Mnookin I, *supra* note 21, at 268; Note, *Child Neglect: Due Process for the Parent,* 70 Colum. L. Rev. 405 (1970); Note, *Developments in the Law, supra* note 2, at 1232; Daly, *Termination of Parental Rights and the Void for Vagueness Doctrine: A Successful Attack on the Parens Patriae Rationale,* 16 J. Fam. L. 213 (1977-78).

[29] The "void for vagueness" rationale for invalidating statutes has most often been applied in the criminal context, Note, *The Void for Vagueness Doctrine in the Supreme Court,* 109 U. Pa. L. Rev. 67 (1960), but it has also been held by this Court to apply to civil statutes. *Giaccio* v. *Pennsylvania,* 382 U.S. 399 (1966). In addition, in deciding when to review a statute for vagueness the Court has looked at the seriousness of the "disability or restraint." *Jordan* v. *DeGeorge,* 341 U.S. 223 (1951); *Kennedy* v. *Mendoza-Martinez,* 273 U.S. 144 (1963). Termination of parental rights, although a civil proceeding, involves fundamental interests in family life.

sider. "Not fit to continue to exercise parental rights" and "best interests of the child"[30]are so vague that "men of common intelligence must necessarily guess at [their] meaning and differ as to [their] application." *Connally* v. *General Const. Co.,* 269 U.S. 385, 391 (1925). As there is no agreement as to what is a "fit" parent nor what is the "best interest of the child,"[31] judges and social workers operating under vague statutes have only personal values about child-rearing to guide them.[32] Thus, vague statutes "impermissibly delegate basic policy matters to . . . judges and . . . [social workers] for resolution on an ad hoc and subjective basis." *Grayned* v. *City of Rockford,* 408 U.S. 104, 108-09 (1972).

The initial application of these vague standards is made by social workers in public and private child welfare agencies, many of whom have insufficient training to enable them to make crucial decisions without guidance on whether to remove children, return them home or prepare them for adoption.[33] Also, the typical

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[30] This Court has used these terms but not to provide guidance as to the constitutional adequacy of state statutory standards. Rather, it has used these terms to state general principles of constitutional law. *Stanley, supra; Caban, supra.*

[31] Our historic commitment to diversity and freedom to choose lifestyles has militated against acceptance of any national standard of child rearing. *Belotti,* 99 S. Ct. at 3045.

[32] As one commentator concluded from an examination of available court decisions, "a judge's attitude toward child rearing, sexual mores, religion, or cleanliness can affect the result of court proceedings." Mnookin I, *supra* note 21, at 269-70.

[33] A recent Department of Health, Education and Welfare-funded national study of social services to families and children reported that three out of four children being served by public social service departments in this country were assigned to staff who were dependent on in-service training to acquire whatever knowledge or skill about families and children they brought to their work. Shyne and

child welfare worker has a large caseload, leaving little time for individualized attention to individual cases and children.[34] As vague laws do not inform child welfare workers what is expected of them, many workers are unable and fail to plan appropriate placement and services for children in their charge.[35]

In the absence of any articulation of standards for when to return a child home or to terminate parental rights, there is little effort to periodically review the status of children in care and to force dispositions in individual cases so as to provide permanence in a manner appropriate to the needs of each child. Only about 25 states currently require periodic review of children in

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Schroeder, *National Study of Social Services to Children and Their Families* 147-48 (1978). *See* Campbell, *The Neglected Child: His and His Family's Treatment Under Massachusetts Law and Practice and Their Rights Under the Due Process Clause,* 4 Suffolk L. Rev. 632, 641-44 (1970). Several studies have evidenced the vast disagreement among social workers on the application of vague criteria to decisions to remove a child from home. *See* Mnookin, *Foster Care—In Whose Best Interest?,* 43 Harv. Ed. Rev. 599, 619 (1973) [hereinafter cited as Mnookin II]; Richan, *Personnel Issues in Child Welfare,* in *Child Welfare Strategy in the Coming Years* 227, 231-33 (DHEW Publication No. OHDS 78-30158 1978); Wald I, *supra* at 1001-02 n.98.

[34] The National Commission on Children in Need of Parents in its inquiry into the failures of the foster care system found estimates of 50 to 90 cases per worker in the majority of the 34 states for which data were available. National Commission, *supra* at 36-37.

[35] For example, "the average child in foster care in North Carolina has spent 40% of his life in foster care, without a permanent home. More than half this time in foster care is being spent without any plan for the child's future." Governor's Advocacy Council on Children and Youth, *supra* note 17, at vi. When plans do exist, too frequently they simply call for continuation of foster care. Governor's Advocacy Council on Children and Youth, *supra* note 17, at 59; Jeter, *Children, Problems and Services in Child Welfare Programs* (1963); Wiltse and Gambrill, *Foster Care 1973: A Reappraisal,* 32 Public Welfare 7 (1974).

foster care by a body independent of the agency providing care. Children's Defense Fund, *supra* note 16, at Appendix L. The lack of guidance to social workers perpetuates a "rescue" syndrome in which some workers lose sight of their appropriate role[36] and act too quickly seeking to terminate parental rights prematurely. Or other workers often find it difficult to act at all because they do not know what will be expected by the judge who will decide the case. Wald, *State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards,* 27 Stan. L. Rev. 985, 1001 n. 97 (1975) [hereinafter cited as Wald II],

As this Court has already noted, "judges too may find it difficult, in utilizing vague standards like 'the best interests of the child', to avoid decisions resting on subjective values." *OFFER,* 431 U.S. at 835 n.36. They are not trained to make without guidance delicate decisions on what is appropriate for a given child. Wald I, *supra* at 640 n.83; Mnookin I, *supra* note 21, at 671-72. Vague statutes do not instruct them as to what factors to consider and how to measure them.[37]

The decision in this case demonstrates the lack of guidance vague standards offer to courts. The Superior Court had no guidance as to how to measure or apply the "best interests" standard, and, as a result, its decision reflects its disapproval of the parents but little con-

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[36] Numerous commentators have discussed this syndrome. Platt, *The Child Savers* (1969); Levine, *Caveat Parens: A Demystification of the Child Protection System,* 35 U. Pitt. L. Rev. 1 (1973).

[37] In recognition of the need to further advise judges about the harms of the foster care system, and the importance of post-dispositional review hearings in which the appropriateness of each child's continued placement is carefully considered, the National Council of Juvenile and Family Court Judges is in the process of developing a Bench Book for its judges.

sideration of the children's needs or the harms threatening their interests.

2. Inadequate standards for decision making are particulariy unfair because of the considerable differences in life styles between the subjects of termination proceedings and those making decisions—judges and agency social workers.[38] Minority children are especially vulnerable to the harms of the child welfare system[39] Biases against the poor significantly affect decisions concerning initial removal and eventual return, and are in part responsible for the overrepresentation of the poor in the foster care system.[40]

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[38] Vagueness is particularly harmful in this area in that decision-making is "shaped by a service enterprise and a professional culture dominated by middle class, majority assumptions, and a tendency to read pathology into behavior that does not conform." Richan, *supra* note 33, at 232.

[39] A study of child welfare in Arkansas, for example, reported that 22% of the black children in care had been there for over ten years, as contrasted with only 2% of the white children. Seventy-seven percent of the white children had been in care *less* than two years; 60% of the black children had been in care *over* three years. The average length of stay in foster care for a white child in 1978 was 7.52 years, for a black child 12.76 years. Masem, *Child Welfare in Arkansas* 12-13 (1979). See also Billingsley and Giovannoni, *Children of the Storm: Black Children and American Child Welfare* (1972).

[40] One study showed that while only 3% of the families in the general population were on public assistance, 42% of the neglect families were relief recipients. Boehn, *The Community and the Social Agency Define Neglect,* 43 Child Welfare 453, 459 (1964). "In Massachusetts, in 1971, 61 percent of children in foster care came originally from families with incomes under $5,000; only 6 percent came from families with incomes over $10,000." Keniston and The Carnegie Council on Children, *supra* note 1, at 32. More recent state data have revealed similar patterns. See, for example, Governor's Advocacy Council on Children and Youth, *supra* note 17, at 17; New Jersey State Legislature Office of Legislative Services, Division of Budget and Program Review, *Characteristics of DYFS Children in Residential and Foster Care* 14-15 (1979). Other

3. There is little opportunity for review of the decisions. In this area which is of fundamental importance to those affected and where the probabilities of violations of interests are so high, vague standards do not require careful articulation of the bases for decisions. Without specific articulation of reasons, a reviewing court cannot determine when inappropriate considerations have entered into decision-making.[41]

4. The risk of children being harmed by vague termination of parental rights standards is especially high because the vague termination standards are applied on top of vague standards for removal in the initial neglect proceeding. In most states the same or similar vague standards are grounds for initial removal from the home and for termination.[42] The double vagueness[43] harms

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reasons also partially account for the overrepresentation of the poor in the child welfare system. Mnookin II, *supra* note 33, at 619; Rein, Nutt and Weiss, *Foster Family Care: Myth and Reality,* in *Children and Decent People* (Schorr ed. 1974).

[41] There has also been criticism that parents are deprived of due process because they are not given adequate notice of what conduct will lead to removal of children and termination of parental rights, and are unable to present adequate defenses in judicial proceedings because of the inability to predict upon what grounds the court will base its decision. Mnookin I, *supra* note 21, at 260-262. This latter problem is further exacerbated by the lack of counsel for parents and/or children in neglect proceedings, Wald I, *supra* at 30 n.28, which occurs because of parents' lack of financial means to afford counsel and the inability of publicly funded attorneys to represent the poor in all legal proceedings affecting them.

[42] In 20 states, removal and termination are dispositional alternatives at neglect proceedings, often with no or little guidance as to which to order: Alabama, Ala. Code tit. 12 § 12-15-71 (1975); Alaska, Alaska Stat. § 47.10.080(c) (1979); Colorado, Colo. Rev. Stat. § 19-3-111 (1973); Connecticut, Conn. Gen. Stat. Ann. § 17-43a(a) (West Supp. 1980); District of Columbia, D.C. Code § 16-2320 (West 1967); Florida, Fla. Stat. Ann. § 39.41 (West 1979); Georgia, Ga. Code Ann. § 24A-3201(a)(2) (Supp. 1979); Iowa, Iowa Code § 232.115 (Supp. 1979); Kansas, Kans. Stat.

children: vague standards encourage removal at the neglect proceeding but often discourage termination.

§ 38-824 (Supp. 1979); Kentucky, Ky. Rev. Stat. § 199.600 (1977); Minnesota, Minn. Stat. § 260.235 (Supp. 1979); Nebraska, Neb. Rev. Stat. § 43-209 (1978); North Carolina, N.C. Gen. Stat. § 7A-289.32(2) (Supp. 1979); North Dakota, N. Dak. Cent. Code § 27-20-44 (Supp. 1979); Ohio, Ohio Rev. Code Ann. § 2151.353 (1970); South Carolina, S.C. Code § 20-10-170 (1976); South Dakota, S. Dak. Compiled Laws Ann. §§ 26-8-35, 26-8-36 (Supp. 1979); Vermont, Vt. Stat. Ann. tit. 33 § 656 (Supp. 1979); Virginia, Va. Code §§ 16.1-279, 16.1-283 (Supp. 1979); West Virginia, W. Va. Code § 49-6-5 (Supp. 1979).

In 23 states a prior adjudication of neglect is grounds for termination. Some jurisdictions require only an additional finding that termination is in the child's best interests: District of Columbia, D.C. Code § 16-2354(b) (West Supp. 1978); Florida, Fla. Stat. Ann. § 39.41(a)(d)(1) (West 1979). Some states require only an additional finding that conditions which resulted in prior adjudication of neglect are likely to continue: Connecticut, Conn. Gen. Stat. Ann. § 17-43a(a) (West Supp. 1980); Hawaii, Haw. Rev. Stat. § 571-61 (Supp. 1979); Michigan, Mich. Comp. Laws Ann. § 712A.19a(f) (West Supp. 1979); Oklahoma, Okla. Stat. tit. 10 § 1130.A(3) (West Supp. 1978); Utah, Utah Code Ann. § 78-3a-48(1)(c) (1977). Other states require additional findings that conditions will continue and that parents were offered rehabilitative services: Indiana, Ind. Code § 31-6-5-4 (Supp. 1979); Iowa, Iowa Code § 232.114 (West Supp. 1979); Louisiana, La. Rev. Stat. Ann. § 13:1601.B, D (West Supp. 1975); Maryland, Md. Ann. Code art. 16 § 75 (Supp. 1979); Minnesota, Minn. Stat. § 260.221(b)(5) (Supp. 1980); Missouri, Mo. Ann. Stat. § 211.447(2)(h) (Vernon Supp. 1980); Nebraska, Neb. Rev. Stat. §§ 43-202(2), 43-209(6) (1972); New Hampshire, N.H. Rev. Stat. Ann. § 170-C:5(III) (1978); New York, N.Y. Fam. Ct. Act § 614.1 (West 1979); North Carolina, N.C. Gen. Stat. § 7A-289.32(3) (Supp. 1979); Oregon, Or. Rev. Stat. § 419.523(2)(e) (1978); South Carolina, S.C. Code §§ 20-11-20(2)(a), 20-11-40 (1976); Tennessee, Tenn. Code Ann. §§ 37-238(d), 37-238(2) (1977); Virginia, Va. Code §§ 16.1-283(B), (C) (Supp. 1979); Washington, Wash. Rev. Code Ann. §§ 13.34.180, 13.34.190 (Supp. 1979); Wisconsin, Wis. Stat. Ann. § 48.40(2)(e) (West Supp. 1979).

[43] Problems of notice, discriminatory application and chilling effect are aggravated by "double ambiguity" as this Court has seen in the abortion context, *Colautti* v. *Frankin*, 439 U.S. 379,

Despite the realities of the length of time children spend in foster care, social workers and judges view the initial removal from the home as a temporary measure, neither harmful to children's interest in permanence nor destructive of the family unit. This view is consistent with the stated purpose of neglect statutes and of foster care. At the initial removal, it is not clear that the child will be severely harmed by removal unless it is admitted that placement is not temporary and will often lead to long and harmful stays in foster care. However, at termination, it is clear that the family unit will be destroyed and the child subjected to the harms of separation and that often there is no guarantee the child will leave foster care for a new permanent family through adoption.[44] In light of this, some judges and social workers are often reluctant to terminate whatever family ties remain.

In addition, social workers and judges often share the country's ideological commitment to the natural family and are, therefore, reluctant to terminate, although they do not see reunification of the family as a possibility.[45] Vague standards are thus to a significant extent responsible for the foster care limbo.

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99 S. Ct. 675, 685 (1979), when the Court invalidated a law which was vague as to the stage of development requiring the exercise of a special standard of care as well as to the standard for judgment.

[44] Termination of parental rights in and of itself does not mean that a child will be adopted, although termination is a necessary step preceding adoption. In fact, some state termination statutes specifically require that efforts be taken to seek prompt adoptive placement after termination, and that the court be advised of the status of such efforts. *See,* for example, D.C. Code § 16-2360 (West 1967); Wash. Rev. Code § 13.34.210 (Supp. 1979).

[45] As one child welfare worker expressed it, "Judges sometimes become rather sentimental about abandonment proceedings. They don't want to be the one who 'took the child from the mother.' " Note, *Child Abandonment: The Botched Beginning of the Adoption Process,* 60 Yale L.J. 1240, 1242 n.11 (1951). *See* Children's Defense Fund, *supra* note 16, at 27-29.

C. Vague standards were not developed to ensure family integrity.

The statutes, from which come key concepts of what constitutes grounds for removal of a child from the home and termination of parental rights, were based on notions that certain parental characteristics were *per se* grounds for separating families. The first statutes were enacted in the colonies in the seventeenth century. These standards were aimed at the children of the poor and were in that regard specific. In the eighteenth century terms like "incapable of bringing up or supporting their child" were added, but the statutes were rarely used against others than the poor. Areen, *supra* note 9, at 899-900; tenBroek, *California's Dual System of Family Law: Its Origin, Development and Present Status, Part I,* 16 Stan. L. Rev. 257 (1969). Although poverty has been rejected as a ground in and of itself for state intervention by the courts and by our national commitment of financial aid to preserve the integrity of poor families, it is still listed directly or indirectly as a ground for neglect proceedings in several states. Areen, *supra* note 9, at 926.

In the latter part of the last century, neglect and dependency, like delinquency,were seen as grounds for removing children permanently from their parents in order to prevent a life of crime.[46] The concept was one of "preventive penology": the conditions of the home which led to crime, including poverty and immorality of parents, were to be identified and children to be

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[46] For purposes of setting out the responsibilities of the Delaware Division of Social Services for the care and custody of children, the definition of "neglected child" includes "a child . . . who associates with vagrant, vicious or immoral persons." Del. Code tit. 31 § 301 (1974).

removed from homes which exhibited such conditions. Thomas, *supra* note 9, at 324; Fox, *Juvenile Justice Reform: An Historical Perspective,* 22 Stan. L. Rev. 1187, 1193 (1970). Again these statutes were often specific as to what was an immoral person. Areen, *supra* note 9, at 903.

In the twentieth century while attitudes toward permanently severing family ties because of parents' life styles have changed, statutory standards have not. Now there is widespread recognition that the maintenance of a child in a home offers the child the best opportunities for development. Beck, *supra* n. 8. The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime* 7 (1967). Almost all state neglect laws contain purpose clauses which reiterate that belief.[47] Although the precursor of the AFDC program limited aid to those who were considered "morally fit," *King* v. *Smith,* 392 U.S. 309, 321 (1968), in the AFDC program Congress determined that immorality and illegitimacy

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[47] The Delaware Code provides as the purpose for state intervention:

> In the firm belief that compliance with the law by the individual and preservation of the family as a unit are fundamental to the maintenance of a stable, democratic society, the General Assembly intends by enactment of this chapter that one court shall have original statewide civil and criminal jurisdiction over family and child matters and offenses as set forth herein. The court shall endeavor to provide for each person coming under its jurisdiction such control, care, and treatment as will best serve the interests of the public, the family, and the offender, to the end that the home will, if possible, remain unbroken and the family members will recognize and discharge their legal and moral responsibilities to the public and to one another.

Del. Code tit. 10 § 902 (1974). Other state purpose clauses are similar. Katz, *supra* note 11, at 70.

should be dealt with through rehabilitative measures. *Id.* at 325.[48] But child welfare statutes have not been modified to reflect these changes.

With the juvenile court movement in the twentieth century, the concept that broad and vague standards would encourage individualized decision-making to meet the unique needs of each child was introduced into neglected child proceedings but it has failed there as it failed in the juvenile delinquency area.[49] Instead, "parents patriae" power was and still is used to punish parents rather than further the children's interests and meet their needs.[50]

The use of the "best interests of the child" standard as a guide to the choice of disposition[51] for

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[48] The Aid to Families with Dependent Children program which offers funds to states for support of needy children stated the national goal of keeping children in their homes and funding "protective services" for that purpose as the preferred alternative for the care of children who are dependent, neglected or "in danger of becoming delinquent." 42 U.S.C. § 601 (1974).

[49] This Court has found, "[j]uvenile court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." *In re Gault,* 387 U.S. at 18. The "vague and overbroad grounds for delinquency adjudication" have been noted by at least one member of this Court. *McKeiver* v. *Pennsylvania,* 403 U.S. 528, 553 (1970) (White, J., concurring). There has been widespread criticism of vague standards in the juvenile area. Note, *Parens Patriae and Statutory Vagueness in the Juvenile Court,* 82 Yale L.J. 745, 768 n.137 (1963).

[50] The children who were brought to court under juvenile court statutes as neglected were and are still often treated similarly to those brought to court as "delinquent." Note, *Developments in the Law, supra* note 2, at 1225-26; Thomas, *supra* note 9, at 300-07; Note, *Child Neglect: Due Process for the Parent,* 70 Col. L. Rev. 465, 469 (1970).

[51] "Best interests" is used in many statutes to direct the disposition of the child after a finding that there exist grounds for removal and/or termination. Wald I, *supra* at 634-35.

children was also not developed to ensure family permanence. It was developed to decide custody disputes between parents.[52] Such disputes, unlike termination proceedings, are the result of voluntary actions on the part of family members to destroy the integrity of the family unit. Children are not faced with the total loss of continuity and permanence that they face when the state is taking them from both parents.[53]

Thus although the wording of neglect and termination statutes remains, in some states, much as it was in the nineteenth century, the statutory goals of intervention as well as the knowledge of how best to protect children have changed radically. The retention of vague statutory language has meant that social workers and judges are not guided in furthering the current goals of state intervention into families.

When a decision has such profound effects on the fundamental interest of a child[54] and can cause such great harm as the decision to permanently remove a child from the home, vague statutes whose only guidance to state officials is to remove from "unfit" parents when in the "best interests of the child" fail to protect children from harmful decisions.

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[52] The first reported judicial use of the standard was in 1840 in *Mercein* v. *People,* 35 Am. Dec. 653 (N.Y. 1840), where the court was faced with a custody dispute between a father and a mother. Areen, *supra* note 9, at 900 n.74.

[53] As one commentator has argued, private disputes over child custody do not implicate, as do disputes over state neglect interventions, "profound questions of political and moral philosophy concerning the proper relationship of children to their family and the family to the state." Mnookin I, *supra* note 21, at 226, 268.

[54] The "best interest of the child" standard is used in many contexts other than custody decisions. Its use has been criticized in these contexts also. *See, e.g., Belotti,* _____ U.S. _____, 99 S. Ct. at 3054 (Stevens, J., concurring) (use of best interests to decide

III. Standards Governing Termination Decisions Can And Must Provide Specific Guidelines Which Focus On The Child's Needs To Ensure Protection Of The Family Unit And To Minimize Harm To Children.

The elimination of vague standards is essential, but this Court must also provide guidance to others to ensure a system in which family integrity is protected, harm to children minimized, and constitutional rights protected. Due process requires statutory standards which focus on the interests and needs of the child, not merely on parental misconduct, to ensure termination decisions are made appropriately and only when there are the requisite "compelling" interests.

Standards can be drawn which are specific and which reduce the risk of harm to children and parents. Psychological and sociological research supports the use of specific standards which are based on considerations reflecting the interests and needs of the child. Model codes have been drafted which incorporate these concepts and states have acted to adopt these more specific standards.

A. Standards for termination must focus on the child.

Present standards for termination lead to decisions which do not consider the interests of the child but focus on parental conduct alone. As we argued above, standards which focus solely on parental misconduct, even if specific, do not promote family integrity and are

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whether to allow abortion); Goldstein, *Medical Care for the Child at Risk: On State Supervision of Parental Autonomy,* 86 Yale L.J. 645 (1977) (use of best interests to decide whether to intervene in medical decision concerning child).

not consistent with our national commitment to the family. Termination of parental rights may lead only to the perpetual limbo of foster care and its harmful effects, in addition to the other harms caused by separation from the family for the child. Before embarking on a course which may result in such great harm to a child, the state must ensure that a decision is made that the harm of remaining in or returning to the home, along with the child's interest in a new permanent family, outweigh these concerns. See pp. 15-16 *infra*.

Standards which focus on the needs of the child, rather than on arbitrary notions as to proper child-rearing and home conditions, promote family integrity by limiting the removal of children and the break-up of the family to situations of "compelling" need, where it is necessary to protect children and ensure continuous and permanent family relationships. Finally, in cases where return home is impossible or inappropriate, such standards make it easier for judges and social workers to make difficult decisions and to begin the process of finding the child a new permanent family. See pp. 28-30 *infra*.

The protection of children's fundamental interests in continuous and permanent family relationships demands that standards for termination require decision-makers to weigh relative harms to the child.

B. Standards for termination of parental rights can contain specific guidelines which focus on the child's needs.

It is the task of state legislators to draft new and constitutionally adequate standards for termination. However, this Court should give guidance to them as to the contours of an interest compelling enough to justify terminating family ties.

There are five basic considerations which can be measured and which can guide decision-makers to terminate parental rights only when necessary to protect children's and parents' fundamental interests. These five considerations (age of the child, length of time in care, attempts made to eliminate the harms resulting in removal and the likelihood of reunification, relationship of the parent and child, and relationship of the child and his or her caretaker) must all be addressed to ensure a decision to terminate the parent-child relationship is in fact in the best interests of the child. We are not suggesting that a statute is sufficiently specific if it simply lists these five factors as matters which can be considered. Rather, we maintain that these factors should guide legislators in drafting statutes which specify how the factors are to be applied.

Recent statutory changes have been made in some states which reflect these five key considerations and which provide specific guidance to decision-makers. Model codes which reflect these considerations have been drafted by several eminent bodies. Model Adoption Legislation and Procedures Advisory Panel,[55] *Model State Adoption Act and Model State Adoption Procedures, reprinted in* 45 Fed. Reg. 10622, 10686 (1980)

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[55] The Model Adoption Legislation and Procedures Advisory Panel was established pursuant to the Child Abuse Prevention and Treatment and Adoption Reform Act, 42 U.S.C. § 5101 *et seq.* (1977), as an independent expert panel to recommend to the Secretary of the United States Department of Health, Education and Welfare model legislation and procedures relating to adoption, with special attention to barriers to the adoption of special needs children. The Panel is composed of a state legislator, state child welfare administrator, a juvenile court judge, a birth parent, adoptive parent, and others with expertise in child welfare. The model law as submitted by the Panel to the Secretary has been published for public comment, 45 Fed. Reg. 10622 (1980).

[hereinafter cited as Model State Adoption Act]; Institute of Judicial Administration, American Bar Association, *Standards Relating to Abuse and Neglect* (Tentative Draft) (1977) [hereinafter cited as ABA Draft Standards]; Neglected Children Committee, National Council of Juvenile Court Judges, *Lincoln Model Statute for Termination of Parental Rights,* 27 Juvenile Justice 3 (1976) [hereinafter cited as Lincoln Model Statute].

Further elaboration on each of the criteria, and how these criteria have guided recent statutory amendments and the drafting of model codes is set forth below.

1. *Age of Child.* A child's age is intimately related to his interest in permanence and in a continuous family relationship. Disruptions of continuity have different consequences for children of different ages.[56] Decisions concerning termination should reflect consideration of the age of the child in relation to the length of time the child has been separated from his or her family and the child's capacity to maintain existing relationships or develop new interpersonal relationships.[57] The impact of

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[56] "The significance of parental absences depends, then, upon their duration, frequency, and the developmental period during which they occur. The younger the child, the shorter is the interval before a leave-taking will be experienced as a permanent loss accompanied by feelings of helplessness and profound deprivation. Since a child's sense of time is directly related to his capacity to cope with breaches in continuity, it becomes a factor in determining if, when, and with what urgency the law should act." Goldstein, Freud, and Solnit, *supra* note 6, at 42.

[57] For example, the longitudinal study of 624 children in foster care in New York City revealed that the younger children were more likely to maintain the greater level of attachment to their families than the children who entered care at an holder age. Fanshel and Shinn, *supra* note 18, at 402-404.

a lingering discontinuous relationship, for example, may be more harmful for children of certain ages than for others. The ABA Draft Standards §§ 8.3A,B provide that consideration of termination is triggered by different periods of parent-child separation depending on the child's age.

Age also affects the extent to which a child's wishes should be considered in a decision to terminate. In some states, for example, statutes specify that parental rights shall not or need not be terminated if the child is of a certain age and objects to the termination. Va. Code § 16.1-283E (Supp. 1979) (fourteen years of age or age of discretion determined by court); Iowa Code § 232.114(6)(b) (West Supp. 1979) (over ten years of age); W.Va. Code § 49-6-5(6) (Supp. 1979) (fourteen years of age or age of discretion as determined by the court); Cal. Welf. & Inst. Code § 366.5(e)(1)(B) (West Supp. 1979) (fourteen years of age or older); Model State Adoption Act § 313(d)(6) (termination where child over ten years of age consents to adoption and has been out of home three years); ABA Draft Standards § 8.4E (child over ten years of age can object).

Similarly, the child's age is relevant in considering a child's desire to remain with a caretaker with whom the child had developed a relationship over time.

2. *Length of Time in Care.* The length of time since separation from the parent is an important consideration in determining the appropriateness of termination. Numerous studies have documented that the probability of a child's returning home is greatest earlier in placement and decrease rapidly after the child has

been in care for from eighteen months to two years.[58] The likelihood of multiple placements and lack of meaningful parental contact also increases with the length of time children are in care, and thus the likelihood of severe harm to the child from lingering in foster care is increased.[59] The length of time since separation from the natural parent and the extent of contact with the parent during the time of separation are also relevant to an evaluation of the child's relationships with his or her parents and present caretaker.

In some states the grounds for termination change as the length of time in care increases. In Iowa, for example, when a child has been adjudicated in need of assistance and has been in care for at least six but less than twelve months, the court may order termination if there is clear and convincing evidence that the child cannot be returned to his/her parents and that the parents have not maintained contact during the previous six months and made no reasonable efforts to resume care despite an opportunity to do so. When a child has been in care for twelve months or longer, contact and efforts to resume care are no longer required considerations. Iowa Code §§ 232.114(4), (5) (West Supp. 1979).

Model statutes suggest similar alterations in standards depending on length of separation. Model State Adoption Act §§ 313(d)(5), (6), 313(e) (standard of review where child has been out of home for one year

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[58] Fanshel and Shinn, *supra* note 18, at 116-123; Maas and Engler, *supra* note 21, at 420; Vasaly, *supra* note 16, at 54.

[59] Fanshel and Shinn, *supra* note 18, at 98-99, 110-111; Vasaly, *supra* note 16, at 54-56. For documentation of the harms incurred, *see* note 26 at page ____, *supra*; Sherman, Neuman and Shyne, *Children Adrift in Foster Care: A Study of Alternative Approaches* 3 (1973)

requires detailed findings, *id.* at §§ 313(d)(5), 313(e), but where child has been out of home three years and is over ten, child can consent to adoption and termination can proceed without further findings, *id.* at § 313(d)(6)).

3. *Attempts to Eliminate Harms and the Likelihood of Reunification.* The progress in eliminating the specific harms which led to the child's removal and placement in foster care must be assessed to determine the likelihood that the child wil be able to return home within a specified time period. The provision of rehabilitative services can facilitate and make possible return home.[60] In evaluating whether or not termination is in a child's best interest, progress toward reunification must be weighed together with the length of time the child has been in care and his or her relationship with natural parents and other caretakers.

A number of state termination of parental rights statutes now specifically direct the court to consider the effect and amount of services provided to the parent to facilitate reunification and/or parental visitation or contact. See, for example, Ky. Rev. Stat. § 199.603(3) (Supp. 1978); Va. Code §§ 16-1-283 B, C (Supp. 1979); Iowa Code § 232.114 (West Supp. 1979); Wash. Rev. Code Ann.§§ 13.34.180(5),(6) (Supp.1979); Ind. Code § 31-6-5-4 (3) (Supp. 1979); W.Va. Code §§ 49-6-5(a),(b) (Supp.1979); Vt. Stat. Ann. tit. 3 § 667(4) (Supp. 1979); Lincoln Model Statute § 12(1)(g); Model State Adoption Act § 313(e) (1).

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[60] Studies have shown that when services are provided to the family, harmful situations can be elilminated and families can be reunited. *See*, Jones, Neuman and Shyne, *A Second Chance for Families: Evaluation of a Program to Reduce Foster Care*, 121-123 (1974); and Pike, *Permanent Planning for Foster Children: The Oregon Project*, 5 Children Today 22-25, 51 (1976).

4. *Relationship of the Parent and Child.* The emotional attachment of the parent and child is crucial to an assessment of the harm which will be caused by termination of the parent-child relationship. The relationship of the parent and child at the time of the termination proceeding can be measured by the expressed attitudes of each and the degree of contact while the child has been in placement. Studies have demonstrated that children with sufficient parental contact stay in foster care for shorter periods and experience fewer placements, thereby minimizing the harms incurred from placement.[61] Parental visiting has been shown to be a significant predictor of the likelihood that a child will be able to return home.[62] However, the significance of contact for an individual child may also vary with the age of the child.

Iowa law governing termination of parental rights, for example, specifically provides that regardless of the existence of grounds for termination, "the court need not terminate the relationship between parents and child if the court finds:. . .there is clear and convincing evidence that such termination would be detrimental to the child at the time due to the closeness of the parent-child relationship. . . ." Iowa Code § 232.114(6)(c) (West Supp. 1979).

One model statute directs the court to consider the "feelings and emotional ties of the child with respect to his parents," and to evaluate the effort the parent has made to facilitate the child's return, including regular visitation or contact, provision of support, and regular

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[61] Fanshel and Shinn, *supra* note 18, at 93-99; Shapiro, *Agencies and Foster Children* 32-34 (1976); Vasaly, *supra* note 16, at 64-65.

[62] Fanshel and Shinn, *supra* note 18, at 93-99; Vasaly, *supra* note 16, at 63. See also note 18, *supra.*

communication with the child's custodian. Model State Adoption Act §§ 313 (e) (3), (4). *See also* Lincoln Model Statute § 12(2); ABA Draft Standards § 8.4A.

5. *Relationship of the Child and the Child's Caretaker.* The relationship of the child and the child's caretaker and the child's chance for a permanent relationship in a new family must be weighed in a termination decision. The extent of this relationship can be measured by the length of time together, the age of the child when it commenced, expressed attitudes toward each other and the caretaker's willingness to ensure permanence for the child.[63]

A child who has been with a substitute caretaker for a long period of time may form a "psychological" parent relationship with that caretaker. The child's need for a family (the need for acceptance, continuity of relationships, a sense of stability in emotional attachments) may be met by these other parents and it may be extremely harmful to a child to end such a relationship. Goldstein, Freud, and Solnit, *supra* note 6. In situations where the caretaker wants to form a permanent relationship with the child, as through adoption, the interests and desire of the child may be the cementing of the relationship with this "psychological parent." In *OFFER,* 431 U.S. at 835, this court recognized the warmth of ties that may form between child and foster parent. The relationship of the child and the caretaker is critical to

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[63] It has been recommended that when termination of parental rights occurs incidental to a petition for adoption of a child by a psychological parent that the termination order should be dissolved if the adoption of the child by that parent is not effected within six months (under six years old) or one year (over six). Ketcham and Babcock, *Statutory Standards for the Involuntary Termination of Parental Rights,* 29 Rutgers Law Rev. 530, 555-556 (1976).

assessing the harm to a child that will result from uprooting him or returning him home.[64]

A number of states and model statutes detailing criteria for assessing the appropriateness of termination include factors which are relevant to the child-caretaker or child-psychological parent relationship. Vermont, for example, assesses the interaction and interrelationship of the child both with his natural parents and with his "foster parents if any." Vt. Stat. Ann. tit. 33§ 667 (Supp. 1979). The District of Columbia, in determining whether it is in the child's best interest that the parent and child relationship be terminated requires that a judge consider "the quality of the interaction and interrelationship of the child with his or her parent, siblings, relatives and/or caretakers, including the foster parent." D.C. Rev. Code Ann. § 16-2353 (b)(3) (Supp.1978). In Washington State, a petition seeking to terminate the parent-child relationship must allege, among other things, "that continuation of the parent and child relationship clearly diminishes the child's prospects for early integration into a stable and permanent home." Wash. Rev. Code Ann. § 13.34.180 (4) (Supp. 1979).

One model statute directs the court to consider the child's ties with the caretaker family, the capacity and disposition of that family to give the child "love, affection, and guidance", the length of time the child has lived in a "stable, satisfactory environment" and the desirability of maintaining the continuity and the permanence as a family unit of the child's placement family, Lincoln Model Statute § 12(3). *See also* Model State Adoption Act. § 313 (d) (6).

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[64] Buxbaum, *supra* note 7, at 21; Geiser, *supra* note 7, at 88-90; Goldstein, Freud and Solnit, *supra* note 6, at 17-19.

Only through statutes which incorporate consideration of key factors and provide specific guidelines to judges and social workers will children's fundamental interests be protected. We, therefore, maintain that the Court must not only invalidate the Delaware statute as vague, but must provide guidance as to what are constitutionally adequate standards in this delicate area.

CONCLUSION

For the reasons set forth above, *amici* urge this Court to reverse the decision of the Delaware Supreme Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-5932

JOHN DOE AND JANE ROE,

Appellants,

v.

THE STATE OF DELAWARE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF FOR THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK, JUVENILE RIGHTS DIVISION, AS *AMICUS CURIAE*

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Sims v. *State Dept. of Public Welfare*, 438 F.Supp. 1179 (S.D. Tex. 1977), *rev'd on other grounds sub nom. Moore* v. *Sims*, 442 U.S. 415 (1979) 11, 12, 14n, 17
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Smith v. *Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977) 8, 13, 19, 24n
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Woodby v. *Immigration and Naturalization Service*, 385 U.S. 276 (1967) 18n

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La. Civ. Code Ann. art. 13:1602 (West Supp. 1979).... 6n

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N.Y. Soc. Serv. Law § 384-b (McKinney Supp. 1979-80) 24n

Miscellaneous:

Chermerinsky, *Defining the Best Interests: Constitutional Protections in Involuntary Adoptions,* 18 J. of Fam. L. 79 (1979) 23n, 24n

L. Cole, Our Children's Keepers (1974) 13n

Crouch, *International Convention Efforts and the Current Status of Children's Rights in the U.S.A.,* [1980] 6 Fam. L. Rep. (BNA) 4023 (May 13, 1980) 19

Day, *Termination of Parental Rights Statutes and the Void for Vagueness Doctrine: A Successful Attack on the* Parens Patriae *Rationale,* 16 J. Fam. L. 213 (1977) 23n

Developments in the Law: The Constitution and the Family, 93 Harv. L. Rev. 1156 (1980) 12, 22n, 25n

Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings,* 11 Harv. C.R.-C.L. L. Rev. 564 (1976) 12

J. Goldstein, A. Freud & A. Solnit, *Before the Best Interests of the Child* (1979) 12, 12n, 23, 24n, 25n

Grumet, *Plaintive Plaintiffs: Victims of the Battered Child Syndrome,* 4 Fam. L. Q. 296 (1970) 14

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M. Guggenheim & A. Sussman, *The Rights of Parents* (unpublished manuscript, Avon Books 1980) 22n

Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy,* 39 Law & Contemp. Prob. 226 (Summer 1975) 12

————, *Foster Care—In Whose Best Interests?,* 43 Harv. Educ. Rev. 599 (1973) 13

Note, *Constitutional Limitations on the Scope of State Child Neglect Statutes,* 79 Colum. L. Rev. 719 (May 1979) 25n

Note, *The Fundamental Right to Family Integrity and Its Role in New York Foster Care Adjudication,* 44 Brooklyn L. Rev. 63 (1977) 21n, 22n

Note, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings,* 68 Geo. L. J. 213 (Oct. 1979) 22n-23n, 24n

Note, Parens Patriae *and Statutory Vagueness in the Juvenile Court,* 82 Yale L. J. 745 (1973) 21n

Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards,* 27 Stan. L. Rev. 985 (1975) 18

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K. Wooden, *Weeping in the Playtime of Others* (1976) 13n

IN THE

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THE STATE OF DELAWARE,

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BRIEF FOR THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK, JUVENILE RIGHTS DIVISION, AS *AMICUS CURIAE*

Interest of *Amicus Curiae*

The Legal Aid Society is a private, non-profit legal assistance agency, which since 1876, has sought to provide quality legal representation to persons living in New York City who cannot afford to pay a private lawyer. The Society has a full-time staff in excess of 600 attorneys, who provide assistance to more than 200,000 people a year in all trial courts in New York City, in the state and federal appellate courts and in this Court.

Amicus curiae, the Juvenile Rights Division of The Legal Aid Society, has been in existence since 1962, when the New York State Legislature enacted the Family Court Act and mandated the assignment of counsel in juvenile pro-

ceedings. The Division at present comprises 76 trial, appellate and special litigation attorneys and a social services support staff of 34, including 18 persons with masters degrees in social work, whose primary responsibility is the representation of juveniles who are the subject of Family Court proceedings in New York City.* In 1979, the Juvenile Rights Division lawyers (referred to by state statute as "law guardians") were assigned as counsel in 17,614 proceedings. The cases included juvenile delinquency, abuse and neglect, persons in need of supervision (PINS), special education, violation of probation, extension, termination or transfer of placement within the child care system, family offense, custody and foster care review proceedings, as well as over 700 proceedings involving the termination of the parent-child relationship.

In addition, staff members represent children in a myriad of cases related to but separate from Family Court assignment, and on a daily basis deal with the home life and foster care problems of New York City area children. Charles Schinitsky, who has been attorney-in-charge of the Division since 1962, regularly has been asked to testify at local, state and federal legislative and administrative hearings concerning the care and protection of children. His study of the role of the lawyer in Children's Court was cited by this Court in *In re Gault*, 387 U.S. 1, 37 n. 62 (1967). He has also served on many committees concerned with children's issues, such as the New York State Juvenile Justice Advisory Board, which dealt with the expenditure of funds under the federal Juvenile Justice and Delinquency Prevention Act, the New York City Mayor's Task Force on Child Abuse and Neglect, an advisory committee to the National Council of Juvenile Court Judges, a com-

* The Division makes extensive use of psychiatric and psychological experts as well.

mittee on public and private child care agencies established by New York State's First and Second Judicial Departments, and the Temporary State Commission to Recodify the Family Court Act.

Based upon its experience, *Amicus* has consistently maintained that children have a right to live in their natural homes, that they should be removed from those homes and placed in foster care only as a last resort, and that they should then be returned to their homes as soon as possible. *Amicus* therefore has urged the introduction of extensive community services so that wherever possible children remain at home and will not have to enter the costly foster care system.

The central issue presented in this case—whether the Delaware proceedings to terminate the parent-child relationship are unconstitutional—is obviously of great importance to the thousands of youngsters in New York City represented by the Juvenile Rights Division in such termination proceedings.

Amicus is submitting this brief because of its concern about the impact of this case on its clients. *Amicus*, as the single largest legal representative of children in the United States, wishes to provide this Court with an analysis of the issues from the viewpoint of the child, which may not otherwise be presented, and which *Amicus* believes itself especially qualified to present.

Statement of the Case

The action to terminate the parental rights of John Doe and Jane Roe was initiated in 1975 in the Delaware Superior Court by the Delaware Department of Health and Social Services pursuant to 13 Del. Code §§ 1101-13. The statutory ground for termination asserted was that the

parents were "not fitted to continue to exercise parental rights" to their five children. 13 Del. Code § 1103(4). The Delaware statute further provided that termination must be "in the best interests of the child." 13 Del. Code § 1108(a). Counsel for the parents challenged the constitutionality of the statute based on its vagueness, and the constitutionality of the termination proceeding based on the use of an inadequate standard of proof. The children were not represented by independent counsel, which is not provided for by the Delaware code or case law.

Subsequently, the Superior Court ordered the parental rights of John Doe and Jane Roe terminated on the grounds that Doe and Roe were "incapable of providing proper care to their children" and that termination was in the children's best interests. The Delaware Supreme Court affirmed the order of the Superior Court, and later denied the motion for reargument filed by the parents. Probable jurisdiction was noted by this Court on March 25, 1980. 48 U.S.L.W. 3613 (1980).

Amicus has received consent from both appellants and the appellee to file this brief.

Summary of Argument

This Court has established that "[n]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault,* 387 U.S. at 13. A child has fundamental liberty interests in life and freedom from harm as well as in family integrity. Usually these interests are consonant with the parents' fundamental interest in the preservation of the family's integrity and the parent-child relationship. There are points, however, at which a child's interests potentially diverge from his parents' in a proceeding to terminate parental rights. Once parents are faced with a court pro-

ceeding in which the involuntary termination of their parental rights is at issue, their primary concern is to defend themselves against that loss. This focus may be contrary to the rights and interests of the child.

At the same time, the child's interests do not thereby become identical with the state's. The "best interests of the child" claimed to be protected by the state is not a monolithic entity, but rather is composed of separate rights, at least one of which, the right to family integrity, cannot be adequately represented by the state. By filing a petition to terminate parental rights, the state has committed itself to the position that termination of the family entity is necessary, and thus the state is principally involved in sustaining the allegations of the petition. The interests of the child, however, may lie in remaining with or returning to his family.

In this case, although the central concern of the action is the welfare of five minor children, there has been no representation of their interests independent of the parents' and the state's interests. There should be little dispute that the child has the most at stake in a termination proceeding. It is ironic that the party with the greatest interest in the outcome of the litigation has no voice in the proceeding. *Amicus* maintains that in order for the full panoply of the children's rights to be protected and for the facts to be fairly and fully presented to the fact-finder, independent counsel for the child is required. Independent counsel is in the best position to establish a confidential, trusting relationship with the child and thus to determine and present the child's wishes, concerns, needs and fears. The child's attorney would function as an advocate and fully participate in the litigation.

Independent counsel for the child who is the subject of a termination proceeding is not a theoretical and untested

concept. An estimated thirty-eight states* at present mandate or permit independent representation of the child in a proceeding that may result in the termination of the parent-child relationship. In New York City since 1976, when the state legislature mandated such representation, *see* N.Y. Family Court Act § 249 (McKinney Supp. 1976-79), *Amicus* has represented over 1,500 children in termination proceedings.

Based on its experience, *Amicus* also supports the appellants' claim that clear and convincing evidence should be the standard of proof in termination proceedings. From the child's perspective, the right to family integrity is sufficiently fundamental that only when it has been proved by a more rigorous standard than preponderance of the evidence that his right to life and to freedom from harm are endangered, would the presumption be overcome that his best interests lie in being with his natural family.

For the same reasons, *Amicus* supports appellants' position that the Delaware statute is so unconstitutionally vague that it permits arbitrary, subjective and discriminatory interference in the constitutionally protected parent-child relationship. While no statute terminating parental rights should be so rigid as to specify every detail of required or proscribed behavior, it should, at a minimum, provide notice as to what conduct by the parent will allow the state to file such a proceeding. Further, the Delaware statute is so overbroad as to permit the state to intervene in the family relationship in a manner that is in violation of fundamental constitutional rights.

Therefore, *Amicus* urges this Court to declare the Delaware termination statute unconstitutional, to declare that

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* See *e.g.*, Ala. Code § 26-14-11 (Ala. Code 1975); Kan. Stat. §§ 38-817, 38-820, 38-821 (Kan. Stat. Ann. Supp. 1979); La. Civ. Code Ann. art. 13:1602 (West Supp. 1979).

the Delaware courts used a constitutionally inadequate standard of proof, and to remand this proceeding for a new hearing at which the child's vital interests are represented by independent counsel.

ARGUMENT

I.

Proceedings to Terminate Involuntarily the Parent-Child Relationship Impinge Upon a Constitutionally Protected Liberty Interest of the Child That Can Only Be Effectively Guaranteed by Separate and Independent Counsel.

In any proceeding where the state seeks the involuntary and permanent termination of the parent-child relationship, the child has substantial individual liberty interests in life and freedom from harm, as well as in the preservation of the family relationship. These interests are equal or superior to those of the parent and are equally deserving of constitutional protection. Given the existence of these fundamental interests, the parent-state conflict that enhances the risk for the child of an erroneous determination, and the grievous loss to the child from improper termination, *Amicus* submits that due process requires that the child be afforded separate and independent legal representation.

The integrity of the natural family unit, free from the coercive interference of the state, has consistently been recognized by this Court to be an essential liberty interest protected by the Due Process Clause of the Fourteenth Amendment. *Meyer* v. *Nebraska,* 262 U.S. 390 (1923); *Prince* v. *Massachusetts,* 321 U.S. 158 (1944); *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *Stanley* v. *Illinois,* 405

U.S. 645 (1972). This right to the enjoyment of familial privacy, which has its source in "intrinsic human rights, as they have been understood in 'this Nation's history and tradition' [cite omitted]," *Smith* v. *Organization of Foster Families for Equality and Reform,* 431 U.S. 816, 845 (1977), encompasses the reciprocal rights of both parents and children. *Duchesne* v. *Sugarman,* 566 F.2d 817, 825 (2d Cir. 1977).

Because parents typically possess the warmth and sensitivity toward their children that make them best suited to the task of child-rearing, it follows that the child is most likely to derive from his natural family the affection, support and protection he requires for positive growth and social adjustment. *Sanchez* v. *Texas Dept. of Human Resources,* 581 S.W.2d 260, 262 (Tex. 1979). The child's interest lies in "not being dislocated from the emotional attachments that derive from the intimacy of daily association with the parent [cite omitted]." *Duchesne* v. *Sugarman,* 566 F.2d at 825. Indeed, a child inappropriately removed from parental custody

> may suffer such serious emotional disturbance and conflict that his ability to function as a normal human being . . . is impaired to such an extent that he can gain no meaningful benefit from his constitutional right to the pursuit of happiness.

Brown v. *Guy,* 476 F.Supp. 771, 773 (D. Nev. 1979).

Thus, to the extent that parents adequately fulfill their obligations to satisfy the child's needs, his interest in family integrity is coterminous with that of his parents. To the extent, however, that parents threaten their children with actual harm, the presumption that the parent-child relationship is transcendant may be overcome.

In so-called "termination of parental rights" proceedings, the state seeks permanently to destroy the parent-child relationship. Indisputably, this action represents one of the most drastic that the state can take against its citizens. *State* v. *Jamison*, 251 Or. 114, 117, 444 P.2d 15, 17 (1968); *In re J.L.B.*, 594 P.2d 1127, 1134 (Mont. 1979); *In re Angelia M.P.*, [1980] 6 Fam. L. Rep. (BNA) 2490, 2491 (Cal. Ct. App. May 1, 1980); *Blakey* v. *Blakey*, 72 Ill. App. 3d 946, 947, 391 N.E. 2d 545 (App. Ct. 1979). The threat of grievous loss occasioned by the state's interference in the constitutionally protected family unit has been held to require the exercise of maximum procedural safeguards. *See, e.g., Alsager* v. *District Court of Polk County, Iowa*, 406 F.Supp. 10 (S.D. Iowa 1975), *aff'd on other grounds*, 545 F.2d 1137 (8th Cir. 1976). For parents, these safeguards have been widely declared to include the right to counsel.*

For children, however, the right to counsel is not uniformly recognized in all jurisdictions. *Amicus* maintains that while the interests of all family members in the preservation of the home may be interwoven, the child's interest should be independently articulated from his unique perspective.

Far from being regarded today as the "property" of his parents, a child is a "person" protected by the Constitution and endowed with constitutional rights. *In re Gault*, 387 U.S. 1;** *Goss* v. *Lopez*, 419 U.S. 565 (1975); *Breed* v.

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* See, *e.g.*, *Cleaver* v. *Wilcox*, 499 F.2d 940 (9th Cir. 1974); *Brown* v. *Guy*, 476 F.Supp. 771 (D. Nev. 1979); *Page* v. *Davis*, 442 F.Supp. 258 (S.D. Fla. 1977); *In re Chad S.*, 580 P.2d 983 (Okla. 1978).

** In *Gault*, this Court recognized the separate liberty interest of a child in a delinquency proceeding as one deserving of constitutional protection, and held that the *parens patriae* model of those proceedings could not justify denying children the right to counsel. That termination proceedings are labelled "civil" rather than "criminal" or "quasi-criminal" should not obscure the fact

Jones, 421 U.S. 519 (1975); *Planned Parenthood* v. *Danforth,* 428 U.S. 52 (1976). Thus, as an individual with a personal stake in the integrity of the parent-child relationship and in his own well-being, the child is constitutionally entitled to no less procedural protection than his parent when the state attempts to intervene in the relationship.

A determination of what process is due depends upon the demands of the particular situation. *Morrissey* v. *Brewer,* 408 U.S. 471, 481 (1972). Apart from the identification of a private interest that rises to the level of a constitutional right, such determination must involve an analysis of the adequacy of existing procedures in protecting the interests affected. *Mathews* v. *Eldridge,* 424 U.S. 319 (1976). In termination proceedings in the State of Delaware, the child, who is the subject of the action, is obliged to accept "joint" representation with either of the other two necessary parties. *Amicus* suggests that due process cannot be achieved by such an arrangement. Only independent counsel for the child can effectively dedicate himself to the sole representation of the child at the fact-finding hearing.

There is a potential for conflict between the interest of the child and those of both the parent and the state that substantially increases the risk of an erroneous determination. Notwithstanding the strong presumption that the natural bonds of affection lead parents to act in the best interests of the child, it is manifest that the parent is incapable of adequately representing his child's interests in termination proceedings. Because the parent stands accused of acts or omissions that threaten the welfare of the

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that the nature of the interest at stake is similar: the child is threatened with removal from his family and possible long-term institutionalization, an "awesome prospect" for non-delinquent as well as delinquent children. *In re Gault,* 387 U.S. at 35. Regardless of the nomenclature employed, the due process analysis is identical. *Roe* v. *Conn,* 417 F.Supp. 769, 780 (M.D. Ala. 1976).

child, a potential conflict is created that weakens the unity of interest between parent and child. Counsel for the accused parent is professionally duty-bound to attempt to refute the charges and to preserve the parent-child relationship for his client, regardless of the interests of the child. Whether or not the child's interest is ultimately determined to reside in the continuation of the natural family relationship, until such determination is made the interests of parent and child remain potentially adverse.*

At the same time, the state is equally incapable of providing the effective representation that the child's interests require. An *ex parte* determination by the state that the natural parents threaten their child's well-being does not create a reverse presumption that the child's ultimate best interest lies in his removal from or the destruction of ties to the natural family unit. To the contrary, the fact that the state seeks the permanent severance of familial bonds in which the child presumptively has a fundamental interest constitutes an obvious conflict. *Sims* v. *State Dept. of Public Welfare,* 438 F.Supp. 1179 (S.D. Tex. 1977), *rev'd on other grounds sub nom. Moore* v. *Sims,* 442 U.S. 415 (1979).

Further, while there may be an appearance of congruity of interest between the state and the child because of the state's recognized right and duty to protect the welfare of its minor citizens, the fact that the termination of a natural parent's rights would make the state the new custodian of the child should immediately indicate the potential for sub-

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* The situation in termination proceedings is readily distinguishable from that in *Parham* v. *J.L.*, 442 U.S. 584 (1979), where this Court held that although the child possessed a substantial liberty interest in not being erroneously institutionalized, there was an *identity* of interest between parent and child in obtaining necessary care and treatment. An adversary precommitment hearing would unduly strain the parent-child relationship and discourage parents from seeking treatment. Here, such a hearing is already a reality, and the parent's and child's interests are potentially adverse.

stantial conflict as well. *Sims* v. *State Dept. of Public Welfare,* 438 F.Supp. 1179. As *parens patriae,* the state lacks both the resources and sensitivity to provide the intimacy, stability and emotional support necessary for the healthy development of individual children. *See Developments in the Law: The Constitution and the Family,* 93 Harv. L. Rev. 1156, 1214 (1980); Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy,* 39 Law & Contemp. Prob. 226, 257-61 n. 102 (Summer 1975); *Bellotti* v. *Baird,* 443 U.S. 622 (1979).* The state is simply "too crude an instrument to become an adequate substitute for flesh and blood parents." J. Goldstein, A. Freud & A. Solnit, *Before the Best Interests of the Child* 12 (1979).**

Where a particular child is considered "adoptable," the state may favor termination of parental rights regardless of an individual child's peculiar interests, both because termination assists in satisfying the demand for "adoptable" children and because it relieves the state from the financial burden of providing either institutional and foster care or public services that might be necessary for the reinforcement or rehabilitation of the child's natural family. Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings,* 11 Harv. C.R.-C.L. L. Rev. 564, 575 (1976). However, since adoption is not a realistic expectation for many children who become wards of the state, other forms of custodial care, such as institutionalization, must be utilized,

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* The parental role in teaching and guiding children to become responsible adults "in large part, is beyond the competence of impersonal political institutions." *Bellotti* v. *Baird,* 443 U.S. at 638.

** Generally, *Amicus* agrees with many of the concepts contained in the Goldstein, Freud and Solnit work. Based on its extensive experience in the representation of children, however, *Amicus* finds the Goldstein, *et al.,* position that the child should only be entitled to independent counsel after the fact-finding stage to be unrealistic and mistaken.

often with unfortunate, even disastrous consequences.* Similarly, long-term foster care, which is the state's principal alternative resource, can never replace nurturing advantages lost to the child from the breakup of his natural family, and may be distinctly inimical to the needs of children. *See* Mnookin, *Foster Care—In Whose Best Interests?*, 43 Harv. Educ. Rev. 599, 605-6 (1973); *In re Jewish Child Care Ass'n* (Sanders), 5 N.Y.2d 227, 156 N.E. 2d 700, 183 N.Y.S.2d 65, (1959); *Smith* v. *Organization of Foster Families for Equality and Reform*, 431 U.S. at 856 (concurring opinion, Stewart, J.)** It is clear that although the familial environment may be adjudged deficient by predominating standards, the state's intervention, however benevolently intended, may provide equally undesirable or worse alternatives. *Alsager* v. *District Court of Polk County, Iowa*, 406 F.Supp. at 23; *In re Raya*, 255 Cal. App. 2d 260, 265, 63 Cal. Rptr. 252, 255-6 (Ct. App. 1969).

Amicus has found that independent counsel has proved to be the most effective method for minimizing the risk of an erroneous termination. In essence, practical experience demonstrates that in dependency proceedings:

> [e]ach attorney presents his arguments from the viewpoint of his client, with the child caught in the mid-

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* The state may choose to institutionalize a child, not necessarily because of his individual needs, but because there are no suitable custodial resources available. *Parham* v. *J.L.*, 442 U.S. at 625 (Brennan, J., concurring in part, dissenting in part).

The appalling conditions in some institutions and the detrimental effects of institutionalization in general upon children have been abundantly demonstrated. *New York State Ass'n for Retarded Children* v. *Rockefeller*, 357 F.Supp. 752 (E.D.N.Y. 1973); K. Wooden, *Weeping in the Playtime of Others* (1976); L. Cole, *Our Children's Keepers* (1974).

** The record in the case at bar poignantly illustrates the deficiencies of the foster care system. There was evidence that the child had been shunted by the state through a series of nine different foster homes.

> dle. . . . While each side argues in terms of the "best interests of the child," beneath this altruistic veneer lies the desire to win the case for the client—who is not the child.

Grumet, *Plaintive Plaintiffs: Victims of the Battered Child Syndrome,* 4 Fam. L. Q. 296, 314 (1970). *Accord, In re Orlando F.,* 40 N.Y.2d 103, 351 N.E.2d 711, 386 N.Y.S.2d 64 (1976).

One of the basic elements of due process is the right to be heard "in a meaningful manner." *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965). In light of the foregoing, it is clear that the child's interests cannot be adequately voiced by either of the adult parties to the action. Consequently, numerous lower courts, both federal and state,* have concluded that because of the competing interests necessarily involved in any suit affecting the parent-child relationship, the child's interest can only be effectively protected by the engagement or appointment of separate and independent counsel. *Amicus* strongly urges the adoption of this view.

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* *See, e.g., Roe* v. *Conn.,* 417 F.Supp. 769 (M.D. Ala. 1976); *Sims* v. *State Dept. of Public Welfare,* 438 F.Supp. 1179 (S.D. Tex. 1977), *rev'd on other gounds sub nom. Moore* v. *Sims,* 442 U.S. 415 (1979); *Ricketts* v. *Ricketts,* 576 S.W.2d 932 (Ark. 1979); *Wagstaff* v. *Superior Court,* 535 P.2d 1220 (Alaska 1975); *In re Orlando F.,* 40 N.Y.2d 103; *Stapleton* v. *Dauphen County Child Care Services,* 228 Pa. Super. Ct. 371, 324 A.2d 562 (1974). Cf. *In re D.,* 24 Or. App. 601, 547 P.2d 175 (Ct. App. 1976), *cert. denied sub nom. C.* v. *F.,* 429 U.S. 907 (1976).

II.

Involuntary Termination of the Constitutionally Protected Parent-Child Relationship Constitutes Such a Severe Deprivation of Liberty That Due Process Requires That the Basis for Termination Be Proven by Clear and Convincing Evidence.

Amicus submits that to satisfy the requirements of procedural due process, the standard of proof in a proceeding to terminate involuntarily and permanently the constitutionally protected parent-child relationship must be clear and convincing evidence. *Amicus'* experience in representing children in termination proceedings counsels that this standard strikes a fair and reasonable accommodation of the various interests at stake, reflects the value for the child of the preservation of the parent-child relationship, and minimizes, to an appreciable extent, the risk of an erroneous decision.

This Court has firmly established that the parent-child relationship merits constitutional protection. *See* Point I, *supra.* When the state intervenes and attempts to separate the child permanently from his parents, the child's paramount liberty interest in the family unit is jeopardized. For this reason alone, a standard of proof higher than mere preponderance of the evidence must be required in a termination proceeding.

A proceeding to terminate the parent-child relationship is simply not an ordinary civil lawsuit. Private interests of the highest magnitude are subject to adjudication. "[O]ne way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate . . . [termination] will be ordered" is to increase the standard of proof. *Addington* v. *Texas,* 441 U.S. 418, 427 (1979).

In *Addington,* this Court unanimously rejected, on due process grounds, the use of the preponderance of the evidence standard in the context of an individual's involuntary civil commitment to a state mental institution. *Addington's* holding and rationale apply with equal, if not greater, force to a proceeding directed at terminating the parent-child relationship.

Just as civil commitment entails a "significant deprivation of liberty," so does termination of the parent-child relationship. *Addington* v. *Texas,* 441 U.S. at 425. In fact, termination "is even more final than involuntary commitment or delinquency proceedings." *State* v. *Robert H.,* 20 N.H. 90, 393 A.2d 1387, 1389 (1978).* Termination of the parent-child relationship has been aptly described as "an extreme intervention into family integrity," *In re J.L.B.,* 594 P.2d at 1134, "as drastic and permanent an action as can be taken," *Blakey* v. *Blakey,* 72 Ill. App. 3d at 947, 391 N.E.2d 545, and a "drastic, final step which, when improvidently employed, can be fraught with danger," *Alsager* v. *District Court of Polk County, Iowa,* 406 F.Supp. at 24.

Cognizant of the fundamental rights involved in a termination proceeding, an increasing number of jurisdictions have required that the evidence supporting termination must be established by, at least, clear and convincing evidence. *In re G.M.,* [1980] 6 Fam. L. Rep. 2349 (Tex. Mar. 19, 1980);** *In re C.L.T.,* 597 P.2d 518 (Alaska 1979); *In re Souza,* 204 Neb. 503, 283 N.W.2d 48 (1979); *Blakey* v. *Blakey,* 72 Ill. App. 3d 946, 391 N.E.2d 545; *In re J.A.,* 283

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* In juvenile delinquency adjudications the standard of proof is beyond a reasonable doubt. *In re Winship,* 397 U.S. 358 (1970).

** *In re G.M.* is especially instructive because, relying expressly on *Addington,* the Texas Supreme Court held that the clear and convincing evidence standard of proof is required in all proceedings seeking involuntary termination of the parent-child relationship.

N.W.2d 83 (N.D. 1979); *In re J.L.B.*, 594 P.2d 1127; *In re Kelley*, 262 N.W.2d 781 (Iowa 1978); *In re Rosenbloom*, 266 N.W. 2d 888 (Minn. 1978); *In re Heidi T.*, 87 Cal. App. 3d 864, 151 Cal. Rptr. 263 (Ct. App. 1978); *State* v. *Robert H.*, 20 N.H. 90, 393 A.2d 1387 (beyond a reasonable doubt); *In re Angelia M.P.*, [1980] 6 Fam. L. Rep. (BNA) 2490 (Cal. Ct. App. May 1, 1980) (beyond a reasonable doubt); *Alsager* v. *District Court of Polk County, Iowa*, 406 F.Supp. at 25,*aff'd on other grounds* 545 F.2d 1137, *Sims* v. *State Dept. of Public Welfare*, 438 F.Supp. at 1194, *rev'd on other grounds sub nom. Moore* v. *Sims*, 442 U.S. 415.*

The standard of proof "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington* v. *Texas*, 441 U.S. at 423. There can be no doubt that both the parent and the child have a significant interest in preventing the erroneous termination of this fundamental human relationship. Since the harm to the child and the parent resulting from an erroneous termination of their relationship is significantly greater than any conceivable harm to the state, the possibility of error must be reduced. Thus, in a termination proceeding the child and parent should not be required to share equally with the state the risk of error. Moreover, the gravity of an improvident termination decision is underscored by the fact that, unlike an initial erroneous decision to commit an individual to an institution, which may be corrected when the individual's case is periodically reviewed by the professional staff, the

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* See also *In re Sego*, 82 Wash. 2d 736, 513 P.2d 831 (1973); *Huey* v. *Lente*, 85 N.M. 597, 514 P.2d 1093 (1973); *In re Adoption of J.S.R.*, 374 A.2d 860 (D.C. 1977); *In re Guardianship of R.*, 155 N.J. Super. 186, 382 A.2d 654 (Super. Ct. App. Div. 1977); *In re Hambelton*, 2 K.A. 2d 68, 574 P.2d 982 (Ct. App. 1978).

decision to terminate the parent-child relationship permanently and irrevocably destroys the family unit. *Cf. Addington* v. *Texas,* 441 U.S. at 428-429. Under these circumstances, the standard of proof in a termination proceeding must be equal to the standard required in civil commitment cases.*

Amicus maintains that the state's interest in protecting the welfare of children can be effectively furthered if the standard of proof in termination proceedings is more stringent than the ordinary civil standard of preponderance of the evidence.** Moreover, despite articulating benevolent motives, the state has often been charged with exceeding its authority in supervising the parent-child relationship and in reorganizing family units. *See, e.g.,* Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards,* 27 Stan. L. Rev. 985 (1975); Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights,* 28 Stan. L. Rev. 625 (1976).

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* In other civil contexts where substantial individual interests were at stake, this Court has required a standard of proof higher than preponderance of the evidence. See, *e.g., Woodby* v. *Immigration and Naturalization Service,* 385 U.S. 276 (1967) (deportation); *Chaunt* v. *United States,* 364 U.S. 350 (1960) (denaturalization); *Schneiderman* v. *United States,* 320 U.S. 118 (1943) (denaturalization). But see *Vance* v. *Terrazas,* —— U.S. ——, 100 S.Ct. 540 (1980) (expatriation).

** Indeed, most recently, a California appeals court, in holding that the beyond a reasonable doubt standard was to be employed in termination proceedings, observed that "[t]he burden, though heavy, is manageable. . . . In all too many cases it is a burden that will easily be met. In unclear cases substantive due process requires that the relationship of parent and child be secure." *In re Angelia M.P.,* [1980] 6 Fam. L. Rep. (BNA) at 2492.

In addition, termination proceedings have been criticized on the grounds that the parent-child relationship was severed abruptly in order to supply the adoption market's demand for young children, and because following termination children would spend many years in state institutions or foster-care placements. Crouch, *International Convention Efforts and the Current Status of Children's Rights in the U.S.A.*, [1980] 6 Fam. L. Rep. (BNA) 4023, 4025 (May 13, 1980). Moreover, termination proceedings have been attacked on the basis of cultural and class prejudice.* *Cf. Smith* v. *Organization of Foster Families for Equality and Reform*, 431 U.S. at 833-34 (foster care).

Therefore, it is critical to the child's interests as well as the parent's interests that the state meet a high standard of proof in a proceeding to terminate the parent-child relationship. To safeguard the integrity of the family unit and to prevent the unjustified destruction of the parent-child relationship, the standard of proof in a termination proceeding must be clear and convincing evidence.

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* In enacting the Indian Child Welfare Act, 25 U.S.C. §§ 1901 *et seq.* (1978), Congress found that many of these same evils existed in child custody proceedings involving Indian families. As a result, Congress required that in a proceeding to terminate the parent-child relationship the evidence supporting termination be established beyond a reasonable doubt. 25 U.S.C. § 1912(f).

III.

The Delaware Statute Allowing Termination of Parental Rights on the Grounds of Unfitness and Best Interests of the Child Is Unconstitutionally Vague and Overbroad.

The parent-child relationships of the five minor children in the case at bar were terminated on the basis of a Delaware statute allowing such termination when the parents have been found "not fitted to continue to exercise parental rights" and when it is in the "best interests" of the children. 13 Del. Code §§1103(4), 1108(a). No explication of these terms or criteria is provided by the statute. Nor have the Delaware courts provided a limiting construction or clarification, except to provide that "not fitted" connotes "unfitted for parental duties." *In re Five Minor Children,* 407 A.2d 198, 199 (Del. 1979); *In re Dingee,* 328 A.2d 139 (Del. 1974). *Amicus* joins with appellants in their contention that the Delaware statute, even as thus construed, is constitutionally infirm on the grounds of vagueness and overbreadth.

As discussed in Point I, *supra,* minors possess a fundamental liberty interest in the preservation of the family unit and in family autonomy, independent of the interests of both their parents or guardians and the state. Critical to juveniles' effective exercise of their due process rights in the termination context is the need for sufficient statutory specificity, notwithstanding the flexibility recognized to be necessary in the domestic relations context. *Amicus* thus contends that the invocation of a vague, overbroad termination statute, which is susceptible to arbitrary application, such as the Delaware statute at issue in the present case, is violative not only of the constitutional rights of the parents but of the children as well.

In order for a statute to be sustained against a challenge of unconstitutional vagueness, this Court has identified three constitutional minima that must be satisfied. First, as held by this Court in the seminal case of *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926), the statute must not be "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its applications." This is critical, regardless of whether the statute is civil or penal in nature. *A.B. Small* v. *American Sugar Refining Co.*, 267 U.S. 233 (1925). *See also Giacco* v. *Pennsylvania*, 382 U.S. 399, 402 (1966). The statute must therefore give "fair warning" of what is prohibited, so as not to "trap the innocent." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972). *See also Hynes* v. *Mayor and Council of Oradell*, 425 U.S. 610, 621 (1976).

In the child-protective area, standards such as the general unfitness and best interests of the child standards embodied in the Delaware termination statute have been held to be unconstitutionally vague precisely because of the risk of "multifarious interpretation" and inadequate notice *see, e.g., Roe* v. *Conn*, 417 F.Supp. 769.* Relying on *Grayned* v. *City of Rockford*, the court in the child-neglect case of *Roe* v. *Conn*, 417 F.Supp. at 780, rejected a "welfare" standard equally as vague as that in the case at bar. The court concluded:

> When is a home an "unfit" or "improper" place for a child? Obviously, this is a question about which men and women of ordinary intelligence would greatly

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* See also Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 Stan. L. Rev. at 649, 688-700; Note, *The Fundamental Right to Family Integrity and Its Role in New York Foster Care Adjudication*, 44 Brooklyn L. Rev. 63, 87 (1977); Note, Parens Patriae *and Statutory Vagueness in the Juvenile Court*, 82 Yale L.J. 745, 746-7 (1973).

> disagree. Their answers would vary in large measure in relation to their differing social, ethical, and religious views. Because these terms are too subjective to denote a sufficient warning to those individuals who might be affected by their proscription, the statute is unconstitutionally vague.

See also Alsager v. *District Court of Polk County, Iowa,* 406 F.Supp. at 17-18;* *Linn* v. *Linn,* 205 Neb. 218, 286 N.W.2d 765 (1980) ("best interests"); *Davis* v. *Smith,* 583 S.W.2d 37 (Ark. 1979) ("proper home").

Second, and perhaps more significant from the minor's point of view, is the requirement that a statute provide sufficiently "explicit standards" for those who apply it to ensure against "arbitrary and discriminatory enforcement" on an "*ad hoc* and subjective basis." *Grayned* v. *City of Rockford,* 408 U.S. at 108-109. *See also Hynes* v. *Mayor and Council of Oradell,* 425 U.S. at 623; *Cramp* v. *Board of Public Instruction,* 368 U.S. 278 (1961).

This stricture is particularly critical in the "highly subjective context of determining an approved mode of child-rearing."** *Alsager* v. *District Court of Polk County, Iowa,*

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* In *Alsager,* the Eighth Circuit ruled the parental rights termination statute at issue unconstitutional as applied, without expressly resolving the issue of facial vagueness. The court abstained to allow the Iowa courts to accord the statute a "plainly desirable limiting construction." 545 F.2d at 1138. Nevertheless, the court held that "at minimum . . . both the vagueness and overbreadth attacks [on the statute] . . . are serious ones", *id.,* leaving unchallenged the reasoning of the District Court.

** See generally M. Guggenheim & A. Sussman, *The Rights of Parents* (unpub. manuscript, Avon Books 1980); *Developments in the Law: The Constitution and The Family,* 93 Harv. L. Rev. at 1215 (1980); Note, *The Fundamental Right to Family Integrity and Its Role in New York Foster Care Adjudication,* 44 Brooklyn L. Rev. at 64; Note, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Ter-*

406 F.Supp. at 18-19; *Linn* v. *Linn*, 205 Neb. 218, 286 N.W.2d at 769; *Davis* v. *Smith*, 583 S.W.2d at 42. As the *Alsager* court noted:

> The termination of the parent-child relationship in any given case may thus turn upon which state officials are involved in the case, rather than upon explicit standards reflecting legislative intent.

406 F.Supp. at 18-19. Vague standards such as unfitness and best interests endow state officials as *parens patriae* with unfettered discretion to the detriment of both child and parents. Goldstein, *et al., Before the Best Interests of the Child* 13-14, 17. *Amicus'* experience reveals that this type of official discretion permits discrimination against poor, minority and other disfavored families.

Third, and most central to children's exercise of their independent liberty interests in family integrity, life and freedom from harm is the requirement that a statute not be so overbroad as to impinge upon fundamental constitutional rights or to punish constitutionally protected conduct.* In essence, the fundamentality of rights at stake has been held to require a more rigorous degree of scrutiny than challenges to statutes solely on notice and arbitrary enforcement grounds, essentially causing the state to as-

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mination Proceedings, 68 Geo. L. J. 213, 240 (Oct. 1979); Chemerinsky, *Defining the Best Interests: Constitutional Protections in Involuntary Adoptions*, 18 J. of Fam. L. 79, 110 (1979).

* This stricture was first recognized in cases where fundamental First Amendment freedoms were at stake. See, *e.g.*, *Grayned* v. *City of Rockford*, 408 U.S. at 108-109; *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614 (1971); *Baggett* v. *Bullit*, 377 U.S. 360, 368 (1964). See generally Day, *Termination of Parental Rights Statutes and the Void for Vagueness Doctrine: A Successful Attack on the* Parens Patriae *Rationale*, 16 J. of Fam. L. 213, 218 (1977).

sume the burden of demonstrating that no overreaching is involved. *See Hynes* v. *Mayor and Council of Oradell,* 425 U.S. at 621; *Rose* v. *Locke,* 423 U.S. 48, 50 n. 3 (1975); *Smith* v. *Goguen,* 415 U.S. 566, 572-3 (1974).

The concept has been recognized in *Alsager* v. *District Court of Polk County, Iowa,* 406 F.Supp. at 18-19, *aff'd as modified,* 545 F.2d 1137, that the danger of an overbroad or vague statute in this context is that it can inhibit the exercise of the "fundamental right to family integrity." *See also Roe* v. *Conn,* 417 F.Supp. at 777, 779; *Linn* v. *Linn,* 205 Neb. 218, 286 N.W.2d at 768; *Davis* v. *Smith,* 583 S.W.2d at 40. An overbroad statute impinging upon this right, therefore, encroaches upon the child's as well as the parent's constitutionally based right to family autonomy.

This rigorous degree of scrutiny necessitates that state intrusions into family life can only be justifiable by a compelling state interest in protecting the child from serious and concrete harm, and only then if less drastic forms of rehabilitative intervention have already been tried or are futile.* The court below properly recognized that termination of the parent-child relationships in the case at bar could not be justified solely upon the basis of "best interests" or by reason of the parents' poverty or lifestyle. *In re Five Minor Children,* 407 A.2d at 199.** Nev-

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* See generally Goldstein, *et al., Before the Best Interests of the Child* 5, 9, 18; Chemerinsky, *Defining the Best Interests: Constitutional Protections in Involuntary Adoptions,* 18 J. of Fam. L. at 105; Note, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings,* 68 Geo. L. J. at 235 (specifically criticising the failure of the Delaware termination statute at issue to mandate consideration of less destructive dispositions). *Cf.* California Family Protection Act of 1976 (1976 Cal.Stats. § 977); N.Y. Soc. Serv. Law § 384-b (McKinney Supp. 1979-80).

** See also *Quilloin* v. *Walcott,* 434 U.S. 246 (1978) [citing *Smith* v. *Organization of Foster Families for Equality and Reform,* 431 U.S. at 856 (concurring opinion, Stewart, J.)]. Several

ertheless, the Court's coupling of the unfitness and best interests standards fails to cure the statute of unconstitutional overbreadth, where no guidelines for the application of either standard have been provided.

Surely, any intrusion into family life must be necessitated by, and be only in direct proportion to, the state's interest in protecting children.* Moreover, while "[m]athematical certainty," and "meticulous specificity or great exactitude" in familial-rights termination statutes would be unnecessary in light of the "[f]lexibility and reasonable breadth" desirable in the child welfare context, *Davis* v. *Smith,* 583 S.W.2d at 42, objective guidelines should be established. The guidelines should focus on the effects of parental conduct upon children, not merely upon the conduct. Intervention should be allowed only to prevent actual or imminent serious harm to children. Moreover, intervention should only be permitted to the extent to which the risk of harm can be decreased.** Most important,

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state courts as well have held that termination of parental rights may not rest on considerations of best interests alone. See, *e.g., In re Sanjivini K.*, 47 N.Y.2d 374, 391 N.E.2d 1316, 418 N.Y.S.2d 339 (1979); *Corey L.* v. *Martin L.*, 45 N.Y.2d 383, 380 N.E.2d 239, 408 N.Y.S.2d 439 (1978); *In Re Fish*, 569 P.2d 924 (Mont. 1977); *In re La Rue,* 244 Pa. Super. Ct. 218, 366 A.2d 1271 (1976); *Westerlund* v. *Croaff,* 68 Ariz. 36, 198 P.2d 842 (1948). Moreover, several courts have required consideration of less detrimental alternatives. See, *e.g., In re Carmelita B.*, 21 Cal. 3d 482, 496, 579 P.2d 514, 523, 146 Cal. Rptr. 623 (1978); *In re LaRue,* 244 Pa. Super. Ct. 218, 366 A.2d 1271.

* See generally Note, *Constitutional Limitations on the Scope of State Child Neglect Statutes,* 79 Colum. L. Rev. 719, 727 (May, 1979).

** See generally, Goldstein, *et al., Before the Best Interests of the Child* 16, 59, 72, 91; *Developments in the Law: The Constitution and the Family,* 93 Harv. L. Rev. at 1318-19; Wald, *State Intervention on Behalf of Neglected Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights,* 28 Stan. L. Rev. at 688-700.

statutory guidelines should conform to the constitutional minima discussed above — that is, definitional precision should be embodied so as to give sufficient notice of proscribed conduct, to guard against arbitrary and discriminatory enforcement, and to prevent overreaching into the protected realm of family life.

In summary, the Delaware termination statute at issue in the present case meets none of these constitutional minima. Without further delineation, neither "unfitness" nor "best interests" is sufficiently precise to provide adequate warning of unacceptable behavior or sufficiently objectified to guard against enforcement on the basis of an official's individual child-rearing preferences. The harms to children to be prevented are not spelled out; nor is there any mandate to use any alternative short of the drastic step of parent-child rights termination. As such, the statute impinges upon both the children's and the parents' exercise of vital constitutional rights and should, therefore, be rejected as unconstitutionally vague and overbroad.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully urges this Court to declare the Delaware termination of parental rights statute unconstitutional, to hold that the Delaware Court's use of the preponderance of the evidence standard in termination proceedings is unconstitutional, and to remand the case for a new hearing at which counsel for the children would be mandated.

Dated: Brooklyn, New York
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No. 79-5932

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

JOHN DOE and JANE ROE,
Appellants,

v.

STATE OF DELAWARE,
Appellee.

On Appeal From the Supreme Court of Delaware

BRIEF OF THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN AND THE GUARDIAN AD LITEM PROGRAM OF THE DISTRICT OF COLUMBIA *AMICI CURIAE*

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Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L. L. REV. 565 (1976)	12
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Katz, *Model Act to Free Children For Permanent Placement*, § 14, 13 FAM. L. Q. 330 (1979)	12
Ketcham & Babcock, *Statutory Standards for the Involuntary Termination of Parental Rights*, 29 RUT. L. REV. 530 (1976)	25
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National Conference of Commissioners on Uniform State Laws, UNIFORM JUVENILE COURT ACT § 26(a) (1968)	12

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IN THE

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OCTOBER TERM, 1979

No. 79-5932

JOHN DOE and JANE ROE,
Appellants,

v.

STATE OF DELAWARE,
Appellee.

On Appeal From the Supreme Court of Delaware

BRIEF OF THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN AND THE GUARDIAN AD LITEM PROGRAM OF THE DISTRICT OF COLUMBIA *AMICI CURIAE*

INTEREST OF *AMICI CURIAE* [1]

The National Association of Counsel for Children is a voluntary, national membership organization concerned

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[1] Letters from the parties consenting to the submission of this *Amici Curiae* brief have been filed with the Clerk of the Court.

with the legal rights and interests of children who are the subjects of child protective, matrimonial, and custody litigation. Established in 1977, the Association has 450 members in 39 States. Membership is predominantly lawyers and judges, but also includes pediatricians, social workers, child psychiatrists and psychologists, law enforcement officers, and private citizens. The Association issues standards and guidelines on the representation of children, holds seminars on legal proceedings affecting children, prepares training and resource materials, and publishes a quarterly newsletter, *The Guardian.*

The Association's interest goes beyond its generalized concern over the legal rights of children. The majority of the Association's members are involved in representing children before the courts; many other members provide court related services to them. Hence, the outcome of this case will have a tangible impact on the work and professional practice of the Association's members.

The Guardian Ad Litem Program of the District of Columbia grew out of the Volunteer Attorneys Program which was established in the Juvenile Court in 1966. Since that time, through the provision of independent legal representation, the Program has sought to protect the best interests and legal rights of allegedly abused and neglected children before the court. The Program now has sixty attorneys who represent all of the approximately 2500 children before the court because of alleged parental maltreatment.

One of the responsibilities of Program attorneys is to initiate proceedings to terminate the parent-child relationship when it is clear that the child's interests require placement in an adoptive home. Thirty to forty termination motions are filed annually. The Guardian Ad Litem Program therefore has a direct interest in this proceeding, because it will have an immediate and compelling impact on its clients and its own activities.

Because of their interest and experience with termination proceedings and their role as children's representatives in court proceedings, the National Association of Counsel for Children and the Guardian Ad Litem Program of the District of Columbia respectfully submit their position with regard to the controversy now before this Court.

QUESTIONS PRESENTED BY THE *AMICI*

1. Under the Federal Rules of Civil Procedure and the Due Process Clause of the Fourteenth Amendment, should the children who are the subjects of this proceeding be given party status *before this Court* and provided with legal representation?

2. If the children are not represented before this Court and the Court holds that the Delaware statute is unconstitutional or was applied unconstitutionally, do the children have a right to a subsequent hearing to determine whether their best interests require that the Court's decision be given nonretroactive application?

STATEMENT OF THE CASE

The immediate issues before this Court are the constitutionality of Delaware's statutory scheme for terminating parental rights and the validity of an order, first entered in 1975, terminating the parental rights of Doe and Roe. But the ultimate issue in this case is the future of the five children who are the subjects of this proceeding—Amy, Bill, Charles, David and Ellen. It is their right to a permanent, stable, and nurturing home environment that has been the reason for the many years of judicial proceedings before the Delaware courts—and now before this Court.

This case reaches this Court after eight years of progressively more extreme State action to protect the

children from what the Delaware authorities determined was a harmful child rearing situation. The children have been in the care of the State of Delaware for almost all of their lives:

- Amy has been out of her parents' care for seven of her nine years of life;
- Bill has been out of his parents' care for seven of his eight years of life;
- Charles has been out of his parents' care for five and one half of his six years of life;
- David has been out of his parents' care for four and two thirds of his five years of life; and
- Ellen has been out of her parents' care for four and two thirds of her five years of life.[2]

The children have not seen Doe or Roe at least since 1975. *Appellee's Motion To Dismiss Or Affirm* 2 n.1. The Appellee informs *Amici* that, for some time, all five children have been in pre-adoptive foster homes. (The State has postponed formal adoption proceedings, pending the outcome of this appeal.) If the decision to terminate parental rights is affirmed, the children are slated to be adopted by the foster parents with whom they live. If the decision is overturned, presumably Doe and Roe will seek to regain custody of the children, or at least reassert their right to visitation. *Id.*

SUMMARY OF THE ARGUMENT

This case is not simply a legal proceeding to test the constitutionality of the Delaware statute authorizing the termination of parental rights. The future of five chil-

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[2] All figures are approximate, and are based on the full text opinion of the Supreme Court of Delaware, *In the Matter of Five Minor Children*, Appendix A of the *Appellants' Jurisdictional Statement.*

dren hinges on its outcome. Consequently, the five children who are the subjects of this proceeding have an interest in the outcome of the proceeding *before this Court* that is at least equal to, if not greater than, that of either of the named parties.

I

Before this Court, both Doe and Roe and the State of Delaware claim to speak for the children's best interests, but neither can do so because they each can be expected to pursue their own interests which may not be consistent with those of the children. Therefore, under the Federal Rules of Civil Procedure these children should be given party status *before this Court.* At the same time, an attorney should be appointed to represent them.

The Due Process Clause of the Fourteenth Amendment also requires that the children be given party status and provided with legal representation. The children's interest in a permanent, stable and nurturing home environment—at stake in this proceeding—is a constitutionally protected liberty interest stemming from the right enjoyed by biological families to be free from unwarranted state intervention.

The long time that these five children have spent in foster care establishes an independent reason to hold that the children enjoy a liberty interest in the outcome of the proceeding that requires the appointment of counsel. These five children have been in foster homes maintained by the State of Delaware and have been without parental visitation for almost all of their lives. In the time that these five children have been in their pre-adoptive homes, their foster parents may have become their psychological parents, making their relationship with them sufficiently akin to that of a biological family to merit similar constitutional protection.

However, it may not be necessary for this Court to reach the issue of the liberty interest in family privacy enjoyed by foster children. There is a real danger that the 1976 order terminating parental rights will be vacated without due consideration of the children's dependence on the emotional and familial bonds that may exist between them and their pre-adoptive foster parents. The possible harm that could result will be the direct consequence of this Court's decision. (The possibility of strong emotional and familial bonds between these children and their foster parents arises because of the proper functioning of Delaware's child welfare system and the inexorable running of the calendar, not because of a breakdown in the system.) Therefore, the children have a "state created right" in the continuation of their foster care placement and a subsequent adoption, if that would be in their best interests.

For all of the above reasons, the children should be given party status *before this Court* and an attorney should be appointed to represent them.

II

If this Court holds that the Delaware statute is unconstitutional or was applied unconstitutionally, and Delaware courts are forced to vacate the termination order, it is possible that the children will suffer serious and longlasting harm. Therefore, their best interests may require that the Court's decision be given nonretroactive, *i.e.*, prospective, application. The proposition that the passage of time from the first assertion of parental rights to its final resolution (in their favor) may prevent a full vindication of those rights raises many serious problems. However, children are not property to be returned to their "lawful owners" regardless of the emotional damage to them.

Without the children's participation, through a legal representative, in the proceeding before this Court, it is not possible to determine what disposition will be in their best interests. Therefore, if the Delaware statute is held to be unconstitutional, and a sufficient inquiry into the children's best interests cannot be conducted by this Court, the case should be remanded to the Delaware courts for their determination as to whether the Court's decision should be given nonretroactive application, based on what would be in the best interests of each individual child—as determined by a subsequent evidentiary hearing.

ARGUMENT

I. UNDER THE FEDERAL RULES OF CIVIL PROCEDURE AND THE DUE PROCESS CLAUSE, THE CHILDREN WHO ARE THE SUBJECTS OF THIS PROCEEDING SHOULD BE GIVEN PARTY STATUS BEFORE THIS COURT AND PROVIDED WITH LEGAL REPRESENTATION.

These proceedings have had—and will continue to have—a direct, substantial, and longlasting effect on the life of each of the five children who are the subjects of this proceeding. From the time each of the five children was removed from Doe's and Roe's custody, the Delaware authorities have decided where and with whom they would live, whether they would see their parents, and who would care, protect, and nurture them until their maturity. As the result of Delaware state action, their "future life, security and stability are irrevocably changed." *Drummond* v. *Fulton County Department of Family & Children's Services*, 547 F.2d 835, 836 (5th Cir. 1977).

Delaware courts, like those in all States, have discretionary authority to appoint a guardian *ad litem* or other representative for children whose interests may conflict

with those of their parents.[3] DEL. CODE ANN., Fam. Ct. Rules, Rule 360 (1974). In fact, according to the Delaware Attorney General, the express policy of the State of Delaware is that: "In all civil actions involving either abuse or neglect of children, a social worker from Child Protective Services of the Division of Social Services, [*sic*] is appointed by the court to act as guardian *ad litem* for the alleged abused or neglected child."[4] Despite these five children's deep interest in the outcome of these proceedings, and despite this express policy, they have never been provided with independent representation.[5]

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[3] Recently, there has been a legislative movement to mandate such appointments in child protective and termination proceedings. At least in part, this expansion of children's representation has been the result of impetus from the United States Congress. Under the Federal Child Abuse Prevention and Treatment Act, in order to be eligible for Federal child abuse funds, States must "provide that in every case involving an abused or neglected child which results in a judicial proceeding a guardian ad litem shall be appointed to represent the child." 42 U.S.C. § 5103(b)(2)(G) (1978). In response to this Federal requirement, at least 42 States now provide a guardian ad litem in all judicial proceedings resulting from child abuse and neglect. In most States, this appointment is mandated by State law. *See, e.g.*, N.Y. FAM. CT. ACT § 249 (McKinney 1979). But other States have coupled a permissive statute with a mandatory, or at least seemingly mandatory, practice of appointments, submitting documentary evidence that the appointments are in fact made in all cases. Delaware is in the latter category. *See generally*, U.S. National Center on Child Abuse and Neglect, CHILD ABUSE AND NEGLECT STATE REPORTING LAWS 24-25 (1979).

[4] Attached as Appendix A.

[5] While the appointment of a State social worker is not the most effective means of assuring adequate representation for the children, at least it would have created a fiduciary relationship between the State and the children, which would

A. The Federal Rules Of Civil Procedure Require That The Children Be Given Party Status Before This Court And Provided With Legal Counsel.

This case is not simply a legal proceeding to test the constitutionality of the Delaware statute authorizing the termination of parental rights. The future of five children hinges on its outcome. If this Court holds that the Delaware proceedings are free from constitutional defect, the decision to terminate parental rights will become final and the children will be freed for adoption by their pre-adoptive foster parents. On the other hand, if this Court holds that the Delaware statute is unconstitutional or was applied unconstitutionally,[6] the children's situation will revert to temporary foster care under Delaware's neglect and dependency laws. Depending on what this Court decides, the children (1) may have the legal tie to their biological parents permanently severed, (2) may be left in the uncertain limbo of foster care, with the possibility that they may remain in that temporary status for years, or (3) may be returned to Doe or Roe, perhaps in deeply harmful circumstances.[7] Consequently, the five children who are the subjects of this proceeding have an interest in the outcome of the proceeding *before this Court* that is at least equal to, if not greater than, that of either of the named parties.

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formally require the State to consider the best interests of the children in its handling of this litigation.

[6] Although *Amici* take no position on these issues, they wish to note their general support for the proposition that child protective and termination statutes should contain a specification of the harm or threatened harm to the child that would result if the child were to remain in the care of his parents.

[7] These latter two possibilities are further discussed in Point IIA, *infra*.

Before this Court, both Doe and Roe and the State of Delaware claim to speak for the children's best interests, *Appellants' Opposition To Appellee's Motion To Dismiss or Affirm* 5; *Appellee's Motion To Dismiss or Affirm* 9 & 16, but neither can do so because, as described below, they each can be expected to pursue their own interests which may not be consistent with those of the children. Therefore, under Rule 19(a)(2) of the Federal Rules of Civil Procedure, these children should be given status *before this Court.* At the same time, an attorney should be appointed to represent them pursuant to Rule 17( ).[8]

Under normal circumstances, parents are presumed to represent and to speak for their children's best interests. *Parham* v. *J.R.*, 442 U.S. 584, 603-604 (1979); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). But: "As with so many other legal presumptions, experience and reality rebut what the law accepts as a starting point; the incidence of child neglect or abuse attests to this." *Parham* v. *J.R.*, 442 U.S. at 603.

Doe and Roe apparently do not challenge the initial finding of neglect made by the Delaware courts (as opposed to the decision to terminate parental rights made in a separate and subsequent proceeding). Although Doe and Roe have the parental right to assert what they consider to be in the children's best interests, it is not unfair to presume that their prime goal, like that of so many parents who have had their children removed from them, is to regain custody of the children.

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[8] Appointment of an attorney rather than a guardian ad litem is proposed because the situation precludes the children's appointed representative from being the sole party to assert which outcome would be in the children's best interests. *Smith* v. *Organization of Foster Families For Equality and Reform*, 431 U.S. 816, 841 n.44, 842 n.45 (1977) [hereinafter *"OFFER"*].

The State of Delaware also cannot claim to represent the best interests of the children, even though the rationale for state intervention into family life is to protect children. *Prince* v. *Massachusetts*, 321 U.S. 158, 168 (1944). This Court has repeatedly held that the state's good intentions alone do not justify the conclusion that it is acting in an individual's best interests. *See, e.g., In re Gault*, 387 U.S. 1, 16 (1966). Furthermore: "When terminations are viewed as a means of facilitating adoptions, one becomes aware that they will always promote the interests of the state regardless of the peculiar interests of any single child; terminations aid the state in meeting the demand for 'adoptable' children while also relieving it from the financial costs of long-term foster care, homemaker services, and other welfare or public services." *State ex rel. Juvenile Department of Multnomah County* v. *Wade*, 19 Ore. App. 314, 322, 527 P.2d 753, 757, *reh'g denied* 19 Ore. App. 835, 528 P.2d 1382 (1974), *appeal dismissed sub nom. Wade* v. *Oregon*, 423 U.S. 806 (1975); *Drummond* v. *Fulton County Department of Family & Children's Services*, 563 F.2d 1200, 1210 (5th Cir.) (*en banc*), *cert. denied* 437 U.S. 910 (1977). *But cf. In re D.*, 24 Ore. App. 601, 610, 547 P.2d 175, 181 (1976), *cert. denied* 429 U.S. 907 (1976) (limiting the mandatory appointment of counsel for children to situations in which it would serve an "identifiable purpose"). The State's failure to follow its own policy concerning the appointment of an independant representative for the children, in the proceedings below, underscores the limits of the State's ability to protect the children's separate interests.

One of the State's goals before this Court must be presumed to be the defense of its statutory framework and the vindication of its eight year involvement with this family. Even if the Attorney General was to determine that, in the children's best interests, they should be returned to their parents—as the State's chief legal of-

ficer—he might feel bound to defend the State law and the State actions under it. *Cf. Tshovich* v. *United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972) (When a public official must protect specific individual interests and public interests, and this dual obligation may dictate different approaches to litigation, the individuals affected are entitled to intervene to protect their interests).

The inherently conflicting interests of children, parents, and the State have led almost every model law or standard addressing the termination of parental rights or child protective court action to recommend the independent representation of children.[9] Commentators have been equally supportive of the child's right to separate representation.[10]

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[9] *See, e.g.*, U.S. National Center on Child Abuse and Neglect, FEDERAL STANDARDS FOR CHILD ABUSE AND NEGLECT PREVENTION AND TREATMENT PROGRAMS, Standard B-5 (1978); IJA/ABA Juvenile Justice Standards Project, COUNSEL FOR PRIVATE PARTIES, § 1.1, 2.3 (1977); National Conference of Commissioners on Uniform State Laws, UNIFORM JUVENILE COURT ACT § 26(a) (1968); National Council on Crime and Delinquency, MODEL RULES FOR JUVENILE COURTS, Rule 3, 13, 39 (1960).

[10] *See, e.g.*, J. Goldstein, A. Freud, A. Solnit, BEFORE THE BEST INTERESTS OF THE CHILD 111, *et seq.* (1979); Katz, *Model Act to Free Children For Permanent Placement*, § 14 13 FAM. L. Q. 330, 339 (1979); Redeker, *The Right of an Abused Child to Independent Counsel and the Role of the Child Advocate in Child Abuse Cases*, 23 VILL. L. REV. 521 (1977-78); Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L. L. REV. 565 (1976); Foster & Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343 (1972).

Amici are not arguing that all foster children are necessarily entitled to representation by independent counsel. Rather, we argue that the particular situation of these five children calls for such appointment because they have "an interest in the subject of the action" and are "so situated that the disposition of the action in [their] absence may . . . as a practical matter impair or impede [their] ability to protect that interest. . ." FED. R. CIV. P. 19 (a)(2). *Cf. OFFER*, 431 U.S. at 850, 852 (holding that the Due Process Clause does not make the need for counsel "automatic" in "all preremoval hearings"). In *OFFER*, 431 U.S. at 841 n.44, this Court noted the children's need for independent representation in a similar situation:

> In this case, . . . the State, the natural parents, and the foster parents, all of whom share some portion of the responsibility for guardianship of the child, . . . are parties, and all contend that the position they advocate is most in accord with the rights and interests of the children. In this situation, the District Court properly appointed independent counsel to represent the children, so that the court could have the benefit of an independent advocate for the welfare of the children, unprejudiced by the possibly conflicting interests and desires of the other parties.

The inability of either named party to adequately represent the interests of these children is perhaps best evidenced by the fact that, in the papers so far submitted to this Court, neither party has raised the issue of the children's need for emotional and familial permanency.[11] The fact that an issue of such fundamental importance to the children has been neglected by both parties completely undermines their assertions that they can speak for the children. If these five children are not given party status before this Court and do not have an at-

[11] *See* Points IB and IIA, *infra*.

torney appointed to represent them, there can be no assurance that considerations of their best interests will be raised.

Such action would be in the Court's own interest as well, because it will encourage the orderly and complete consideration of this case and help prevent erroneous judicial decision-making. *See Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). For example, if the children were parties before this Court, the matters that they might raise, through appointed counsel, include: whether the Delaware statute was applied constitutionally as to them; whether their lack of representation at the State court level "led to . . . easily identifiable errors and omissions which are . . . of such . . . constitutional magnitude as to require vacating the judgment below",[12] *Amicus Brief of the American Civil Liberties Union* 34-35; and whether the protection of each child's interests would require prospective application of the Court's decision, if the Delaware statute is found to be unconstitutional.[13]

The fact that this case has reached the appellate level does not preclude the appointment of counsel. *See, e.g., Drummond* v. *Fulton Co. Dept. of Family and Children's Services*, 563 F.2d at 1204. The procedure would be equivalent to one in which a third party seeks to intervene in a proceeding already before this Court. Under the Federal Rules of Civil Procedure, intervention is a

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[12] Without access to the full record and without knowledge of the children's present situation, these *Amici* cannot reach this conclusion. It may be, for example, that the original termination order was in the children's best interests or that their present situation requires that the termination order be sustained. In fact, the ensuing delay in finalizing the children's legal status might well be contrary to their best interests. *See* Point II A, *infra.*

[13] *See* Point II, *infra.*

matter of right "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." FED. R. CIV. P. 24(a)(2). A person may intervene at the appellate level even though he was not a party or intervenor to an action below. *Hurd* v. *Illinois Bell Tel. Co.*, 234 F.2d 942 (7th Cir.), *cert. denied* 352 U.S. 918 (1956). Intervention is also permitted before this Court. *Eastern-Central Motor Carriers Assoc.* v. *United States*, 321 U.S. 194, 198-199 n.5 (1944).

Accordingly, Federal courts have established a three-part test for intervention: (1) the sufficiency of the interest affected by the disposition, (2) the adequacy of the existing parties' representation of the applicant's interest, and (3) the timeliness of the application. *International Tank Terminal, LTD* v. *M/V Acadia Forest*, 579 F.2d 964 (5th Cir. 1978); *U.S. Postal Service* v. *Brennan*, 579 F.2d 188 (2d Cir. 1978). When a party seeks to intervene for the first time at the appellate level, courts pay particular attention to whether prejudice may result to any of the named parties. *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO Local 283* v. *Scofield*, 382 U.S. 205, 215 (1965).

The situation of these five children satisfies each of these considerations. As discussed throughout this brief, the children have a substantial interest in the outcome of this proceeding, which neither named party can adequately represent. Moreover, the parties will not be prejudiced by the children's intervention. Both parties will be free to pursue their respective arguments about the constitutionality of the Delaware termination statute and procedures. Besides addressing the constitutional issues

before this Court, the only issue that the children, through their representative, would raise is the need to protect their best interests—an issue already before this Court. After failing to appoint an independent representative for the children, as its own policy required, the State cannot now claim prejudice. Similarly, the parents cannot claim to be prejudiced by an independent assessment of their children's best interests. They, like the State, would still be able to assert their views concerning the best interests of the children. *See OFFER*, 431 U.S. at 841 n.44.

Finally, the named parties cannot claim that the children's failure to assert their right to participation and representation in these proceedings constitutes a waiver of that right. The children range in age from five to nine years; unrepresented children of such tender years cannot be held to have waived their procedural and constitutional rights by their failure to exercise them. *See, e.g., Dixon* v. *United States*, 197 F.Supp. 798 (W.D. S.C. 1961).

B. The Due Process Clause Of The Fourteenth Amendment Requires That The Children Be Given Party Status Before This Court And Provided With Legal Representation.

1. *Protection of Family Relationships.*

The children's interest in a permanent, stable and nurturing home environment—at stake in this proceeding—is a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. As this Court said in *Quilloin* v. *Walcott*, 434 U.S. 246, 255 (1977) (quoting *OFFER*, 431 U.S. at 863, Stewart, J., concurring) (emphasis added):

> We have little doubt that the Due Process Clause would be offended "[i]f the State were to attempt to

> force the breakup of a natural family, over the objections of the parents *and the children*, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.

For the purposes of the instant case, the operative language is: "*over the objections of . . . the children.*" The right to family privacy and permanence is enjoyed by both the parents and the children. A child is more dependent on the support and nurturance provided by the family than the adult parent, and, therefore, has an equal if not greater interest in maintaining the family relationship. "The parent has a 'right' to rear its child, and the child has the 'right' to be raised by its parent." *Bennett* v. *Jeffreys*, 40 N.Y.2d 543, 546, 387 N.Y.S.2d 821, 824, 356 N.E.2d 277, 281 (1976). *Accord*, *Brown* v. *Guy*, 476 F.Supp. 771, 773 (D. Nev. 1979); *Sanchez* v. *Texas Dept. of Human Resources*, 581 S.W.2d 260, 262 (Tex. 1979). "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 74 (1976); *In re Gault*, 387 U.S. at 13.

The right of children to protest when the State seeks to breakup a biological family tends to be forgotten because the parents are the ones who usually object.[14] However, to protect the independent interests of children, courts are increasingly recognizing the child's separate right to counsel. *See, e.g.*, *Drummond* v. *Fulton County Department of Family & Children's Services*, 547 F.2d

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[14] If they do not, the child's interest in staying in the natural home is presumably lessened, although situations can be imagined in which the parents may not object because of fear of offending the authorities.

835 (5th Cir. 1977); *Sims* v. *State Dept. of Public Welfare*, 438 F.Supp 1179, 1198 (S.D. Tex. 1977), *rev'd on other grounds sub nom. Moore* v. *Sims*, 442 U.S. 415 (1979); *Roe* v. *Conn*, 417 F.Supp. 769 (M.D. Ala. 1976); *Alsager* v. *District Court of Polk County*, 406 F.Supp. 10 (S.D. Iowa 1975), *aff'd in part*, 545 F.2d 1137 (8th Cir. 1976); *Matter of Fish*, 569 P.2d 924 (Mont. 1977); *In re Orlando F.*, 40 N.Y.2d 103, 386 N.Y.S.2d 64 (1976); *Wagstaff* v. *Superior Court*, 535 P.2d 1220 (Ala. 1975); *Stapleton* v. *Dauphin County Welfare Services*, 228 Pa. Super 371, 324 A.2d 562 (1974).

The situation of these five children meets the criteria for the provision of Due Process protections set forth in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).[15] They have a sufficient interest in the outcome of the proceeding; their absence will pose a substantial risk of an erroneous decision; and there are no countervailing interests against representation.

Therefore, *Amici* concur with the arguments made by the *Amicus* briefs of the American Civil Liberties Union and the Legal Aid Society of the City of New York concerning the children's right to counsel, although we would argue that the appropriate remedy for prior non-representation is the appointment of counsel for the children in the proceeding now before this Court.[16]

The long time that these five children have spent in foster care establishes an independent reason to hold that they enjoy a liberty interest in the outcome of the proceeding that requires party status and the appointment of counsel. These five children have been in foster homes

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[15] This test has been utilized by this Court in the specific context of state-family conflicts. *Parham* v. *J.R.*, 442 U.S. at 600; *OFFER*, 431 U.S. at 847-848.

[16] *See* n.12, *supra*, and accompanying text.

maintained by the State of Delaware and have been without parental visitation for almost all of their lives, and, as this Court has previously recognized, "many children, particularly those that enter foster care at a very early age and have little or no contact with their natural parents during extended stays in foster care, often develop deep emotional ties with their foster parents." *OFFER*, 431 U.S. at 836, footnotes omitted. *See generally*, J. Goldstein, A. Freud, A. Solnit, BEYOND THE BEST INTERESTS OF THE CHILD (1973). Thus, the situation of these children raises the "complex and novel question" of the due process rights of children in foster care that this Court did not reach in *OFFER*, 431 U.S. at 847.[17]

The constitutional protection family relationships enjoy stems from the complex emotional relationships involved as well as the simple biological tie. *Moore* v. *City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion of Powell, J.); *OFFER*, 431 U.S. at 844; *Wisconsin* v. *Yoder*, 406 U.S. 205, 231-233 (1972). The longer a loving and stable foster care placement continues, the greater becomes the possibility of ties between the foster child and the foster parent, and the greater becomes the child's presumptive interest in their continuance. As this Court strongly suggested in *OFFER*, there are situations when the foster child's interest in a permanent and stable home environment may enjoy constitutional protection:

> No one would seriously dispute that a deeply loving and independent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. At least where a child

[17] In *OFFER*, this Court did not reach the question of the children's constitutional rights because it held that their best interests required no more than the procedure already provided by the State of New York.

> has been placed in foster care as a infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family. For this reason, we cannot dismiss the foster family as a mere collection of unrelated individuals. *OFFER*, 431 U.S. at 844-845. (footnotes omitted.)

Since *OFFER*, all Federal courts considering the issue have recognized that, at some point, the duration of a loving foster care placement, and the consequent emotional and familial ties it creates, establish a liberty interest in its continuance. *Kyees* v. *County Department of Public Welfare of Tippicanoe Co.*, 600 F.2d 693, 699 (7th Cir. 1979); *Drummond* v. *Fulton County Department of Family and Children's Services*, 563 F.2d at 1209; *Sherrad* v. *Owens*, 484 F.Supp. 728, 740-741 (W.D. Mich. 1980). *See also*, *Caban* v. *Mohammed*, 441 U.S. 380, 402 (1979) (Stevens, J., dissenting) ("The state interest in facilitating adoption in appropriate cases is strong—perhaps even 'compelling'"). In fact, at least one State supreme court has held that in certain "extraordinary circumstances", an independent right to termination and adoption arises, even in the absence of a statutory provision, because "the psychological trauma of removal is grave enough to threaten destruction of the child." *Bennett* v. *Jeffreys*, 40 N.Y.2d at 550, 387 N.Y.S.2d at 827, 356 N.E.2d at 284.

In the time that these five children have been in their pre-adoptive homes, their foster parents may well have become their psychological parents, making "the relation of foster parent to foster child sufficiently akin to the concept of 'family' recognized in [the Court's] precedents to merit similar protection." *OFFER*, 431 U.S. at 842. *See also*, Muench & Levy, *Psychological Parentage: A*

Natural Right, 13 FAM. L. Q. 129 (1979). This possibility gives the children a presumptive liberty interest in the substitute family relation sufficient to require the appointment of counsel to represent them in this proceeding.

2. *The Protection of a State Created Right.*

It may not be necessary for this Court to reach the issue of the liberty interest in family privacy enjoyed by foster children. For, "a person's liberty is equally protected, even when the liberty is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government." *Wolf* v. *McDonnell*, 418 U.S. 539, 558 (1974); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

Ordinarily, foster children are protected by "the requirement of state law that decisions about their placement be determined in the light of their best interests." *OFFER*, 431 U.S. at 860 (Stewart, J., concurring). However, unlike the situation in *OFFER*,[18] there is a real danger that the 1976 order terminating parental rights will be vacated without due consideration of the children's need for continuity and permanence.[19] The possible harm that could result will be the direct consequence of this Court's decision. *Compare with O'Bannon* v. *Town Court Nursing Center*, 78-1318, at 12, *et seq.*

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[18] In *OFFER*, the Court seemed to assume that the purpose of the challenged procedures was to "[inquire] into the child's best interests." 431 U.S. at 852. Similarly, Justice Stewart noted that "transfers in and out of foster 'families are made for a variety of reasons and often involve no more than informed predictions as to what would best serve . . . the safety and welfare of the [child]' ". 431 U.S. at 859 (Stewart, J., concurring) quoting *Meachum* v. *Fano*, 427 U.S. 225, 226 (1976).

[19] *See* Point IIA, *infra.*

(U.S. Sup.Ct. June 23, 1980). Therefore, the children have a "state created right"—in the continuation of the foster placement and the adoption process, if that is in their best interest—which cannot be "arbitrarily abrogated." *Meachum* v. *Fano*, 427 U.S. at 226 (quoting *Wolf* v. *McDonnell*, 418 U.S. at 557).[20]

The possibility of strong emotional and familial bonds between these children and their foster parents arises not because of "a breakdown of the . . . system," *OFFER*, 431 U.S. at 862. (Stewart, J., concurring), but because of the proper functioning of Delaware's child welfare system and the inexorable running of the calendar. A presumptively valid judicial order had been entered to sever the parent/child relationship. The purpose of the children's pre-adoptive foster placements was not, as they were in *OFFER*, to "prepare the child for his return to his real parents", but, rather, to provide a "permanent substitute for the natural home." *Id.* at 861. To

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[20] *Amici* are not arguing that the right to continued foster care placement is enjoyed by the foster parents, a position this Court apparently rejected in *OFFER*. Rather, under facts such as these, the right innures to the children, whether or not the foster parents have an analogous right. [Although the Court's opinion in *OFFER* seems to equate the rights of foster parents with those of foster children, 431 U.S. at 841-842 nn.44-45, as Justice Stewart pointed out: ". . . this is not a case where failure to grant the [foster] parents their requested relief will inevitably tend to '[dilute] or adversely [affect]' the alleged constitutional rights of the children. Denying the [foster] parents a hearing simply has no effect on the children's separate claim to a hearing, and does not impair their alleged constitutional rights." *Id.* at 857 n.1, quoting *Craig* v. *Boren*, 429 U.S. 190, 195-196 (1976).] Hence, the discussion in both the Court's opinion and Justice Stewart's concurrence about the contractual relationship between the foster parents and the State, *id.* at 845-846, 856, is not applicable to this case.

consider the purpose of these children's foster placements as otherwise would be to require State child welfare officials to encourage the continuation of parent/child relationships even when they believe that doing so will be harmful to the children involved, merely because of the possibility that a termination order might eventually be overturned.

These children must have the right to be more than helpless bystanders, unable to be heard, while their whole future is being decided. When, as here, the children's presumptive "parents" (their pre-adoptive foster parents) apparently do not have the right to object,[21] the only other person able to object is the foster child. Surely there arises an independent right for these foster children to be heard before "being condemned to suffer grievous loss". *Joint Anti-Fascist Comm.* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

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Amici recognize that if the Court decides that the children should be given party status and a legal representative, it will have to take such action *sua sponte*. *See, e.g., Drummond* v. *Fulton Co. Dept. of Family and Children's Services*, 563 F.2d at 1204. However, if this Court does not act, who will? Certainly not the State and certainly not the parents, each of whom claim that they represent the best interests of the children. The children should not be penalized because neither named party has taken this necessary step.

If the Court deems it appropriate, counsel for the *Amici* stand ready to represent these children before this Court or to assist the Court in obtaining counsel for them.

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[21] *See* n.20, *supra*.

II. IF THE CHILDREN ARE NOT REPRESENTED BEFORE THIS COURT AND THIS COURT HOLDS THAT THE DELAWARE STATUTE IS UNCONSTITUTIONAL, THE CHILDREN HAVE A RIGHT TO A SUBSEQUENT EVIDENTIARY HEARING TO DETERMINE WHETHER THEIR BEST INTERESTS REQUIRE THAT THE COURT'S DECISION BE GIVEN NONRETROACTIVE APPLICATION.

A. If This Court Holds That The Delaware Statute Is Unconstitutional, The Best Interests Of The Children Might Require That The Court's Decision Be Given Nonretroactive Application.

If the Court holds that the Delaware statute is unconstitutional or was applied unconstitutionally, the children's welfare will be threatened. For, if the termination order is vacated, the children's status will revert to temporary foster care under Delaware's neglect and dependency laws. Then Doe or Roe may renew their claim that Delaware's laws require *present unfitness* for the state to maintain custody and that the children should therefore be returned to them. Transcript of Proceedings, Appendix I of *Appellants' Jurisdictional Statement* 2i. Since it is possible that either Doe or Roe is presently fit, the State may be forced to return the children to Doe or Roe's custody—not because such a return would be in the children's best interests, but because the State lacks statutory grounds for their continued custody.[22]

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[22] Although Delaware's child protective statutes are ambiguous on this question, and there is no controlling decisional authority, the State's dispositional authority under its "neglect" and "dependency" laws seems to be limited to situations of *present parental unfitness. Cf., Alsager* v. *District Court of Polk County*, 384 F.Supp. 643, 652 (S.D. Iowa 1974) (If the parents are presently fit, "there seems to be no barrier to [their] arguing their fitness to be parents of their own children to the appropriate state authorities.")

In fact, there is reason to believe that returning the children to Doe and Roe, who now may be strangers to them, could cause "intense trauma and possibily permanent emotional damage." Ketcham & Babcock, *Statutory Standards for the Involuntary Termination of Parental Rights*, 29 RUT. L. REV. 530, 537 (1976). When a foster child has known only one loving family and is incapable of distinquishing it from his biological one, then the foster family is that child's "natural family" and removal from it will be no less destructive to the child. *Bennett* v. *Jeffreys*, 40 N.Y.2d at 550, 387 N.Y.S. 2d at 827, 356 N.E.2d at 284. *See also*, *OFFER*, 431 U.S. at 844-845.

Even if the children will not be returned to Doe or Roe when their status reverts to temporary foster care, they will nevertheless face a continuation of the uncertainty and impermanence that the last five years of appeals have produced. It could be another two years before their permanent status is finally adjudicated. What, if anything, should the parties do in the interim about the emotional relationship, or lack thereof, between the children and Doe and Roe? Should they maintain the *status quo*? Or, on the ground that the third hearing on termination *may* result in the return of the children to Doe and Roe, should Roe, Doe, and the State—after all these years—seek to reawaken what are apparently long dead, or at least dormant, parental ties, only to face the possibility of severing them once more.

Thus, if the Delaware statute is held to be unconstitutional, the rights of the children to emotional and familial permanency may require that the order terminating parental rights be sustained. For example, in *Syrovatka* v. *Erlich*, 608 F.2d 307, 311 (8th Cir. 1979), the court held that, although there had been a denial of due process in making the original termination order, the disruption of the ensuing thirteen year adoption

would be a "cruel travesty of justice." To prevent a similar injustice in the instant case, it may be necessary to give this Court's decision nonretroactive, *i.e.*, prospective, application. *Cf. Caban* v. *Mohammed*, 441 U.S. at 415-416 (Stevens, J., dissenting) (Because the Court crossed a "new constitutional frontier" in its decision, reliance interests in prior adoption decrees "unquestionably foreclose retroactive application of the ruling".)

The approach *Amici* is proposing is consistent with the modern view favoring flexible remedies in constitutional litigation. In the past, it was said that an unconstitutional statute "confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton* v. *Shelby County*, 118 U.S. 425, 442 (1886). But, "in the last few decades", this Court has "recognized the doctrine of nonretroactivity . . . many times, in both constitutional and nonconstitutional cases." *Lemon* v. *Kurtzman*, 411 U.S. 192, 197-198 (1973).

> However appealing the logic of *Norton* may have been in the abstract, its abandonment reflected our recognition that statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing the doctrine of nonretroactivity. *Id.* at 199, citations omitted.

In constitutional litigation, to determine the "appropriate scope of federal equitable remedies", *id.* at 199, requires "a special blend of what is necessary, what is fair, and what is workable. 'Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.'" *Id.* at 200, footnote

omitted, quoting *Brown* v. *Board of Education*, 349 U.S. 294, 300 (1955).

In *Lemon*, the Court laid out a four part test to determine whether a decision should be given nonretroactive effect: (1) would nonretroactivity "substantially undermine the constitutional issues at stake", *id.* at 201; (2) would the resulting "reliance interests" offset the constitutional harm, *id.* at 203; (3) was there "bad faith" or a "plainly unlawful statute", *id.* at 297; and (4) do considerations of "federalism" suggest that the remedy be confined to future cases, *id.* at 208.

In the instant case, all but one of these considerations is satisfied. Doe's and Roe's constitutional rights as biological parents would be undermined if the decision were given nonretroactive effect, and they were thereby prevented from regaining custody of their children. Parents have a substantial right to raise their children free from unwarranted governmental interference. However, parental rights have always been limited to situations in which the child's health or welfare is not unreasonably harmed or endangered. *Wisconsin* v. *Yoder*, 406 U.S. at 230; *Prince* v. *Massachusetts*, 321 U.S. at 166. Furthermore, this Court has recognized that when there is a conflict between the rights and interests of children and parents, in many situations, those of the children must prevail. *See, e.g., Bellotti* v. *Baird*, 442 U.S. 662 (1979); *Planned Parenthood of Central Missouri* v. *Danforth, supra.*

Although the potential conflict between the legal rights of parents and the interests of their children who are in foster care has not been squarely considered by this Court, in the cases that touch on the issue, this Court has unfailingly acted to protect the apparent best interests of the children. As Justice Stewart said in *OFFER*: "the protection that foster children have is simply the requirement of state law that decisions about

their placement be determined in light of their best interests." *OFFER*, 431 U.S. at 860 (Stewart, J., concurring). This principle is the pre-eminent consideration in child custody decision-making. It is frequently applied even when there is no parental unfitness, if the specific situation requires it. For example, in *Rothstein* v. *Lutheran Social Services of Wisconsin and Upper Michigan*, 405 U.S. 1051 (1972), in vacating an order terminating parental rights and remanding the case for further consideration in light of *Stanley* v. *Illinois*, 405 U.S. 645 (1972), this Court was careful to advise the lower court that there should be "due consideration for the completion of adoption proceedings and the fact that the child has apparently lived with the adoptive family for the intervening period of time."

State courts have also recognized the pre-eminence of the children's best interests in child custody decision-making, even in the face of competing parental legal rights. *See, e.g., Coffey* v. *Dept. of Social Services of Baltimore City*, 41 Md. App. 340, 397 A.2d 233 (1979); *Hoy* v. *Willis*, 165 N.J. Super. 265, 398 A.2d 109 (1978); *In the Matter of Adoption of J.S.R.*, 374 A.2d 860, (D.C. App. 1977); *Bennett* v. *Jeffreys*, *supra*; *In re One Minor Child*, 254 A.2d 443 (Del. 1969). *See generally*, Note, *Psychological Parents* v. *Biological Parents: The Courts Response to New Directions in Child Custody Dispute Resolution*, 17 J. FAM. L. 545 (1978-1979).

Furthermore, because of the passage of time since the first order terminating parental rights, there is a strong possibility that the "warm, enduring, and important" family bonds that this Court has traditionally sought to protect, *Stanley* v. *Illinois*, 405 U.S. at 652, no longer exist between the children and Doe or Roe.[23] If the

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[23] At the 1976 hearing to determine whether parental rights should be terminated, a State social worker stated that "Roe never demonstrated a strong emotional attachment to her

situation is as it appears to be, then, as in *Quilloin* v. *Walcott*, 434 U.S. at 254-255, ". . . this is not a case in which the proposed adoption would place the child with a new set of parents with whom the child has never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except the appellant. Whatever might be required in other situations, we cannot say that the State was required to find anything more than that the adoption . . . was in the 'best interests of the child' ".

Therefore, if this Court holds that the Delaware statute is unconstitutional or was applied unconstitutionally, the countervailing equitable and constitutional rights of these children will require the nonretroactive application of the Court's decision, if that is in their best interests.

B. If The Children Are Not Represented Before This Court, A Separate Evidentiary Hearing Will Be Necessary To Determine Whether The Children's Best Interests Require The Nonretroactive Application Of The Court's Decision.

Amici do not assert that longtime foster family placements create a presumption that the best interests of the children would be served by their remaining in foster care or being adopted by their longtime caretakers, although that is the position of some State laws, *e.g.*, MD. CHANCERY CODE ANN., Art. 16, § 75 (Supp. 1978), and some commentators. *E.g.*, BEFORE THE BEST IN-

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children." Another worker characterized Roe's relationship to her children as "detached". This second worker found that the only strong attachment was between Doe and Amy, and it was described as "unhealthy". *Appellee's Motion To Dismiss or Affirm* 6. On the other hand, a psychologist testified that he found a "good relationship" between the children and Doe and Roe. *Appellants' Brief* 10.

TERESTS OF THE CHILD, *supra* at 39 *et seq.* While the facts of the instant case, to the extent that they are known to *Amici*, suggest that vacating the termination order would be contrary to the children's best interests, without access to the full record and knowledge of the children's present situation, it is impossible to tell whether there are countervailing conditions which argue for the children's return to their biological parents. For example, in *Alsager* v. *District Court of Polk County*, 518 F.2d 1160, 1165 n.3 (8th Cir. 1975), even though all parties, including the parents, assumed that return of the children would not be in their best interests, on remand, it was revealed that the conditions of their foster placements had deteriorated to the point where their return to the parents appeared to be the most appropriate disposition. *Alsager* v. *District Court of Polk County*, 545 F.2d at 1166-1167; *see also*, *Alsager* v. *District Court of Polk County*, 406 F.Supp. at 23. *Compare Bennett* v. *Jeffreys*, *supra*, in which the New York Court of Appeals found that the children's best interests gave rise to an independent constitutional right to termination and adoption *with In the Matter of Sanjivini*, 47 N.Y.2d 374, 382, 418 N.Y.S.2d 334, 344, 391 N.E.2d 1316, 1321 (1979), in which the same court found that, through the 12 years of the child's foster placement, the mother's regular visits have preserved family ties, and, because the child had passed puberty, "she would likely take the transition in stride."

Without the children's participation, through a legal representative, in the proceeding before this Court, it is not possible to determine the strength of the parent/child bond between Doe and Roe and these five children; it is not possible to determine whether strong emotional and family ties have developed between the children and their pre-adoptive foster parents; and it is not possible to determine whether the most appropriate disposition would be to return the children to Doe or Roe, or to institute

promptly adoption proceedings.[24] Nevertheless, it is necessary to conclude that, under the particular facts of this case, there is a strong possibility that vacating the 1976 order terminating parental rights would not only be inconsistent with the children's best interests, but also deeply harmful to them.

Therefore, if the Delaware statute is held to be unconstitutional, and a sufficient inquiry into the children's best interests cannot be conducted by this Court, with the assistance of an appointed representative for the children, the case should be remanded to the Delaware courts for their determination as to whether this Court's decision should be given nonretroactive application, based on what would be in the best interests of each individual child—as determined by a subsequent evidentiary hearing. *See, e.g., Rothstein* v. *Lutheran Social Services of Wisconsin and Upper Michigan, supra; cf. Goldstein* v. *Lavine*, 100 Misc.2d 126, 418 N.Y.S.2d 845 (Sup.Ct., N.Y.Co. 1979) (Even though the foster parents were improperly decertified as foster parents, a subsequent hearing to determine the children's best interests was required before they could be returned to the foster parents.) At this hearing,[25] the Delaware courts should weigh considerations such as those suggested by the *Amicus Brief of the American Orthopsychiatric Association, et al.*, 38-44, with special attention being given to:

(1) The strength of the emotional tie that may remain between the children and their biological parents;

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[24] Of course, it is possible that counsel for the children will also be unable to reach such factual conclusions without a subsequent hearing, or, having made such a determination, counsel might not succeed in convincing this Court about the conclusion's correctness.

[25] At the hearing, the children should be represented by independent legal counsel. *See* Point I, *supra*.

(2) The strength of the emotional ties that may have developed between each of the children and their respective pre-adoptive foster parents;

(3) Any special needs of these children that make one disposition preferable to another; and

(4) The effect on the children of the different possible dispositions of the case.[26]

* * *

Anyone concerned about the rights of parents, and the family as a whole, to be free from unwarranted state intrusion may be justly uncomfortable with the proposition that the passage of time from the first assertion of parental rights to its final resolution (in their favor) may prevent a full vindication of those rights. *See, e.g., Matter of Suzanne Y.*, 92 Misc.2d 652, 662-663, 401 N.Y.S.2d 383, 389-390 (Fam. Ct., N.Y.C. 1977); Lowry, *Children's Rights*, found in: ADVOCATING FOR CHILDREN IN THE COURTS 359, 366 (1979). As one court asked:

> If a couple kidnapped an infant, and within that four years they became the psychological parents of the child and if both the parents and the kidnappers were equal in all respects would it be in the best interest of the child to continue custody with the kidnappers? *Hoy* v. *Willis*, 165 N.J. Super. at 270, 398 A.2d at 111 (quoting the lower court's letter opinion).

But this case is far from that extreme. Neither the State of Delaware nor the pre-adoptive foster parents have kidnapped these children. This case first came to the attention of the Delaware child welfare authorities because the parents themselves requested that the State assume custody of Amy and Bill. *Appellee's Motion To Dismiss or Affirm* 3. From the facts available, it ap-

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[26] These considerations parallel those that Delaware courts already use. *In re Three Minor Children*, 406 A.2d 14, 19 (Del. 1979); *see also*, 13 DEL. CODE ANN. § 772(a) (1978).

pears that Delaware authorities at first provided supportive services in an attempt to help Doe and Roe better care for their children. When the Delaware authorities judged that the initial situation had improved in 1973, they returned Amy and Bill to them. *Id.* at 4. Only later were the children involuntarily removed. In the years since then, Delaware authorities have had legal custody of the children because of an apparently unchallenged judicial determination of parental unfitness, *i.e.*, neglect and incest. After 1975, the parents apparently made no effort to maintain contact with the children, through either agency supervised visitation or written communication.[27]

Furthermore, *Amici* are not arguing that the parents do not have a right to have this Court consider their constitutional claims. First, it is possible that the return of the children to Doe and Roe will be in the children's best interests. Second, even if the children cannot be

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[27] During the long appeals process in this case, Doe and Roe apparently did not request a stay of the order terminating parental rights, which, if granted, would have preserved their visitation rights. *Cf. Appellants' Brief* 10 n.17. *Compare with Lemon* v. *Kurtzman*, 411 U.S. at 196-197, 204-205 (emphasizing that there had been no request for injunctive relief *pendente lite*). Moreover, Appellee claims that, before the order terminating parental rights, parental visitation was also minimal. According to Appellee: In 1973, Amy, Bill, and Charles were involuntarily removed from Doe's and Roe's custody because of the alleged sexual abuse of Amy. After the filing of a criminal complaint alleging the sexual abuse, Doe and Roe fled to Maryland. "During their four month absence from Delaware neither Doe nor Roe inquired about the welfare of their children." *Appellee's Motion to Dismiss or Affirm* 5. For one year after Doe's conviction for the lesser included crime of offensive touching and the crime of child neglect, the children were in foster care, and Doe and Roe made only one contact with them. *Id.* at 6.

returned to them, the parents have the right to have the stigma of the termination decision removed, if it was ordered improperly. *Cf. Brown* v. *Guy*, 476 F.Supp. at 773 (The "stigma" of a civil decree of child abuse or neglect "may be more traumatizing than a fine or imprisonment in a criminal proceeding.") Third, if there was some wrongdoing on the part of State officials, the parents conceivably have a valid claim for money damages under 42 U.S.C. § 1983 (1976). *See, e.g., Kyees* v. *County Department of Public Welfare, supra; Duchesne* v. *Sugarman*, 566 F.2d 817 (2d Cir. 1977); *Sherrad* v. *Owens, supra.*

On the other hand, to hold that these children cannot be protected from continued uncertainty and possibly serious trauma "would be to return to the child-as-chattel mentality." *Stapleton* v. *Dauphin County Child Welfare Services*, 228 Pa. Super at 392, 324 A.2d at 573. Children are not property to be returned to their "lawful owners" regardless of the emotional damage to them. Recognizing the right of these children to an outcome determined in light of their best interests will establish an important principle: foster children are not the "pawns" of the State—or their parents—"who may be whisked from family to family at the whim of state officials." *OFFER*, 431 U.S. at 860 (Stewart, J., concurring).

CONCLUSION

In view of the foregoing, the National Association of Counsel for Children and the Guardian Ad Litem Program of the District of Columbia urge this Court to give these five children party status in the proceeding before it and to appoint a legal representative for them to assure that the issues concerning their best interests are adequately presented to this Court. If such a representative is not appointed, *Amici* further urge that, if this Court holds that the Delaware statute is unconstitu-

tional or was applied unconstitutionally, this Court authorize the Delaware courts to decide whether its decision should be given nonretroactive effect, based on the findings of a subsequent evidentiary hearing to determine the disposition that would be in each child's best interests.

Respectfully submitted,

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June 1980

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* Counsel gratefully acknowledge the assistance of Barry A. Cooper and Neil L. Levine in the preparation of this brief.

APPENDIX

STATE OF DELAWARE
DEPARTMENT OF JUSTICE
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RICHARD R. WIER, JR.
ATTORNEY GENERAL

MAY
24TH
1977

Ms. Judie Drexler
Department of Health and
Social Services
Delaware State Hospital
Administration Building
New Castle, Delaware 19720

Dear Ms. Drexler:

The purpose of this letter is to certify that in the State of Delaware, in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem, or its equivalent, is appointed to represent the interest of the child in such proceeding.

In every criminal action alleging either abuse or neglect of a child, the Assistant Attorney General assigned to prosecute such a case does in fact represent the interest of the alleged child victim during the entire course of the judicial proceeding.

In all civil actions involving either abuse or neglect of children, a social worker from Child Protective Services of the Division of Social Services, is appointed by the court to act as guardian ad litem for the alleged abused or neglected child. Chief Judge Thompson of the Family Court of the State of Delaware has assured this Office that in all such cases, this appointment procedure is followed by the Court. It should further be noted that the Division of Social Services, as an agency of the State of Delaware, is represented in all legal matters by a full-time Deputy or Assistant Attorney General.

It is the opinion of this Office that the above-stated procedures comply with the provisions set forth under the Child Abuse Prevention and Treatment Act (P.L. 93-247, as amended).

If you need any further information or if this Office can be of further assistance, please do not hesitate to contact me.

Very truly yours,

Richard R. Wier, Jr.
Attorney General

RRW,Jr./dak